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No. 08-

IN THE

Supreme Court of the United States

ROGER DALE LEWIS,

Petitioner,

v.

STATE OF TENNESSEE,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Sixth Circuit correctly held—in conflict with four circuits and in accord with six others—that a prosecutor may withhold exculpatory information that would otherwise have to be disclosed under *Brady* v. *Maryland*, 373 U.S. 83 (1963), simply because the information theoretically resides somewhere in the public domain.

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PETITION FOR A WRIT OF CERTIORARI

Roger Dale Lewis respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The Sixth Circuit's opinion is unreported; it is available electronically on Westlaw at 2008 WL 698935. App. 1a. The District Court's opinion is reproduced at App. 69a.

JURISDICTION

The Sixth Circuit's opinion issued on March 14, 2008. On June 2, 2008, Justice Stevens extended the time to file the petition for certiorari to and including

July 28, 2008. App. 110a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

INTRODUCTION

This Court has held time and again that "[a] rule * * * declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process." *Banks* v. *Dretke*, 540 U.S. 668, 696 (2004). Under *Brady* v. *Maryland*, 373 U.S. 83, 87 (1963), and its progeny, a prosecutor must disclose all evidence—exculpatory and impeachment—which, "if disclosed and used effectively, * * * may make the difference between conviction and acquittal." *United States* v. *Bagley*, 473 U.S. 667, 676 (1985). It is an "affirmative duty," *Kyles* v. *Whitley*, 514 U.S. 419, 432 (1995), and one that "illustrates the special role played by the American prosecutor in the search for truth in criminal trials." *Strickler* v. *Greene*, 527 U.S. 263, 281 (1999).

The regional courts of appeals, however, are hopelessly divided over an important and recurring question: whether a prosecutor is relieved from his "affirmative duty" to disclose exculpatory material under *Brady* simply because that evidence exists somewhere—anywhere—in the public domain. Seven circuits—including the Sixth Circuit below—have held that a prosecutor indeed bears no burden to disclose evidence that is otherwise material and

exculpatory so long as it lurks somewhere in the bowels of a public repository. Four circuits—the Fourth, Fifth, Ninth, and Eleventh—have rejected that approach. In those circuits, "if the State fail[s] under a duty to disclose the evidence, then its location in the public record * * * is immaterial." *Johnson* v. *Dretke*, 394 F.3d 332, 335 (5th Cir. 2004). And that is particularly true if, as in this case, defense counsel relied "on affirmative representations by the prosecution that it was keeping the defense apprised of developments in the investigation." *Gantt* v. *Roe*, 389 F.3d 908, 913 (9th Cir. 2004).

The Sixth Circuit below endorsed the majority view in rejecting petitioner's *Brady* claim. That claim was based on the undisputed fact that the prosecutor withheld a key document disclosing the lengthy criminal and fraudulent history of the prosecution's "key witness." App. 1a. The prosecutor withheld this key impeachment evidence, even though he had expressly assured defense counsel that "[t]here is no exculpatory or mitigating evidence known to the State at this time, * * * [and] if additional discovery becomes available you will be advised promptly." CAJA 270. But the Sixth Circuit, in square conflict with four other circuits, held that "the state's failure to turn over the [criminal] records * * * was not a *Brady* violation because those records were publicly available and the petitioner could have obtained them." Pet. 5a.

In reaching that result, the court relied on its recent *en banc* decision in *Bell* v. *Bell*, 512 F.3d 223 (6th Cir. 2008). Reflecting the broader division in the regional courts of appeals, the Sixth Circuit split 6-5 on the question presented in *Bell*. A petition for

a writ of certiorari in that case is currently pending on this Court's docket. *See* No. 07-1506 (filed June 2, 2008). This Court should grant the petitions in *Bell* and in this case and consolidate them for argument. At the very least, this Court should hold this petition pending the disposition of the *Bell* petition.

STATEMENT OF THE CASE

1. In October 1992, the State of Tennessee arrested petitioner Roger Dale Lewis for allegedly setting a fire in an apartment unit. *Lewis* v. *State*, No. M2002-02439-CCA-R3-PC, 2003 WL 22438526, at *1 (Tenn. Crim. App. Oct. 28, 2003). While being held at Sumner County jail, Lewis shared a cell with Ernest Bishop. There, anytime Lewis was not in the bunk, Bishop had access to the search warrant and supporting affidavit detailing the State's case against Lewis. Bishop would become the "key witness" at Lewis's arson trial, testifying that Lewis had confessed to him. App. 1a.

In preparation for trial, Lewis's trial counsel requested from the State—citing *Brady* v. *Maryland*, 373 U.S. 83, 87 (1963)—"any and all evidence in possession of the State or in possession of any governmental agency that might be termed favorable," including evidence that "might favorably be used by the defendant to impeach the credibility of any witness the government intends to call." CAJA 266.

The State prosecutor insisted that he had no such information for the defense. In a written response to Lewis's attorney, the prosecutor expressly assured defense counsel that "[t]here is no exculpatory or mitigating evidence known to the State at this time."

CAJA 270. He then went on to promise Lewis's attorney that "if additional discovery becomes available you will be advised promptly." *Id.*

But the prosecutor did indeed have *Brady* information in his file: a copy of Bishop's report from the National Crime Information Center (NCIC). That report would have been crucial for defense counsel because it chronicled the four-decade long criminal history of Bishop—whom the prosecution touted to the jury as his "key witness." CAJA 83. Had the prosecutor disclosed the NCIC report, defense counsel would have known, for example, that Bishop had criminal charges dating back to 1961, including attempted rape, breaking and entering, and theft. Perhaps even more crucial—given that the prosecution's case hinged on Bishop's credibility and testimony—was information in the NCIC report indicating that Bishop had used a dozen different aliases, each with its own fraudulent Social Security Number. App. 2a-3a.

At trial, defense counsel tried to impeach Bishop on cross examination by asking Bishop if he had been convicted of a felony in the past ten years. Bishop testified that he was "not sure" how many felonies he had been convicted of or whether he had been convicted of a felony in the last ten years. App.2a; CAJA 128-129. Without the NCIC report, defense counsel was unable to impeach Bishop regarding his criminal history and his penchant for fraud and deception. App.2a; CAJA 132.

Lewis was convicted of five counts of aggravated arson, which was subsequently reversed as to four counts. *State* v. *Lewis*, 958 S.W.2d 736 (Tenn. 1997). He was ultimately sentenced to 21 years in prison. *State* v. *Lewis*, 44 S.W.3d 501 (Tenn. 2001).

2. In his state post-conviction proceedings, Lewis asserted, *inter alia*, that the State denied him *Brady* material by withholding Bishop's NCIC report. *Lewis* v. *State*, 2003 WL 22438526, at *7 (Tenn. Crim. App. Oct. 28, 2003). The court noted that "[t]he state has offered no explanation why the information was not provided to the defense," and it found that "the information about Bishop is imbued with impeachment value." *Id.* But the court found it "highly unlikely" that the jury was "favorably impressed with Bishop's honesty or reliability" under the cross examination that defense counsel conducted, even without the NCIC report. *Id.* at *9. It thus denied post-conviction relief on the basis that the suppressed impeachment material did not "undermine confidence in the jury's verdict." *Id.* at *8.

Lewis then filed a *pro se* habeas petition with the United States District Court for the Middle District of Tennessee. The District Court found that the state court's analysis of the *Brady* violation "skate[d] perilously close to a sufficiency of the evidence test"—which is not the proper analysis. App. 96a. But it nevertheless denied the *Brady* claim. App. 99a. The District Court granted a partial certificate of appealability regarding the *Brady* claim, as well as a prosecutorial misconduct claim. App. 70a.

3. On appeal, the Sixth Circuit held that whether a *Brady* violation had occurred in Lewis's case was governed by that court's recent *en banc* decision in *Bell* v. *Bell*, 512 F.3d 223 (6th Cir. 2008), *cert. petition filed June 2, 2008*, No. 07-1506. App. 5a. In *Bell*, the prosecution failed to turn over certain "public sentencing records" showing that the district attorney had elected to drop certain pending charges

against an individual who testified at the defendant's trial; the *Bell* defendant argued that the district attorney dropped the charges in return for testimony, and that this treatment amounted to favorable impeachment evidence that the prosecution was required to disclose under *Brady*. App. 25a, 30a-31a.

The *en banc* court splintered 6-5, with the majority finding no *Brady* violation. In reaching that result, the six-judge majority articulated a bright-line rule of decision: the prosecution has no duty to disclose information that would otherwise qualify as *Brady* material if the information is "readily available to the defense from another source." App. 31a. The five dissenting judges categorically rejected that rule. App. 44a. In the dissent's view, the public availability of *Brady* material does not excuse the prosecutor's independent obligation under this Court's precedents to hand over all exculpatory material in his or her possession.

4. The Sixth Circuit panel that decided Lewis's appeal below found that it was bound by *Bell*. According to the panel, because Lewis met Bishop in prison and knew Bishop was subject to extradition to Texas, Lewis could have independently investigated " 'any pending charges against [Bishop] and their disposition.' " App. 5a (quoting *Bell*, 512 F.2d at 235) (alternation by panel). The panel thus concluded that there was no *Brady* violation by the State's failure to turn over Bishop's NCIC report.[1]

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[1] The panel did not address the fact that the NCIC report included Bishop's *31-year history* of criminal charges and their resolution—not merely those charges that were "pending" while he awaited extradition to Texas as Lewis's bunkmate. Nor did the panel explain how an NCIC report is considered a publicly

REASONS FOR GRANTING THE WRIT

I. THE SIXTH CIRCUIT'S DECISION CONFLICTS WITH AND UNDERMINES THIS COURT'S PRECEDENT.

The Sixth Circuit has endorsed a rule that licenses prosecutors to withhold exculpatory or impeachment materials—even while assuring a criminal defendant that all such material has been turned over—so long as the information withheld could be obtained from some publicly available source. That rule conflicts with this Court's decisions in *Brady* v. *Maryland*, 373 U.S. 83, 87 (1963), *Strickler* v. *Greene*, 527 U.S. 263, 266, 276, 289 (1999), and *Banks* v. *Dretke*, 540 U.S. 668, 695 (2004).

1. This Court's precedents have consistently sought to eliminate prosecutorial deception and gamesmanship. The government's obligation in a criminal prosecution "is not that it shall win a case, but that justice shall be done"; therefore, while the government "may strike hard blows, [it] is not at liberty to strike foul ones." *Berger* v. *United States*, 295 U.S. 78, 88 (1935). To avoid "foul blows" by the prosecution, this Court in *Brady* held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due

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available document that defense counsel could procure through independent investigation. There are in fact strict limits on who is authorized by law to access the NCIC databases or generate reports. *See, e.g.*, "Use and Management of Criminal History Record Information: A Comprehensive Report," U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics at 51 (1993); "Use and Management of Criminal History Record Information: A Comprehensive Report, 2001 Update," U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics at 75-76 (2001).

process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87.

In the years since *Brady* was decided, this Court has reaffirmed the strict disclosure obligations that prosecutors must honor in every case. For example, in *United States* v. *Bagley*, 473 U.S. 667 (1985), this Court extended *Brady* to cover "impeachment evidence," because, "if disclosed and used effectively, it may make the difference between conviction and acquittal." *Bagley*, 473 U.S. at 676; *see Giglio* v. *United States*, 405 U.S. 150, 154 (1972). And the Court has confirmed that defense counsel need not even request exculpatory material; the prosecutor instead has an affirmative obligation to disclose evidence "if there is a reasonable probability that that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Bagley*, 473 U.S. at 682; *see Kyles* v. *Whitley*, 514 U.S. 419, 433 (1995) ("regardless of request, favorable evidence is material, and constitutional error results from its suppression").

2. In *Strickler*, and again in *Banks*, this Court rejected rules that—like the Sixth Circuit's rule—would relax the "prosecution's affirmative duty to disclose evidence favorable to a defendants." *Kyles*, 514 U.S. at 682. In *Strickler*, as in this case, the prosecutor failed to turn over evidence that could have been used to impeach a key prosecution witness. The failure to disclose that evidence was compounded by the fact that the prosecutor purported to have maintained an "open file" policy—meaning that defense counsel was free to examine what was supposed to be the prosecutor's entire case file. *See Strickler*, 527 U.S. at 283. The State

nevertheless insisted that maintaining "an open file policy that did not include all it was supposed to contain is irrelevant because the factual basis for the assertion of a *Brady* claim was available to * * * counsel." *Id.* at 284-285.

This Court disagreed and found that the defendant had established cause for failing to raise his *Brady* claim earlier. The Court concluded that the "nondisclosure and the open file policy [ ] are both fairly characterized as conduct attributable to the Commonwealth that impeded trial counsel's access to the factual basis for making a *Brady* claim." *Id.* at 283. After all, "if a prosecutor asserts that he complies with *Brady* through an open file policy, defense counsel may reasonably rely on that file to contain all materials the State is constitutionally obligated to disclose under *Brady*." *Id.* at 283 n.23.

So too here. The prosecutor below asserted that he had complied with *Brady*, not through an open-file policy, but by expressly telling defense counsel that "[t]here is no exculpatory or mitigating evidence known to the State at this time * * * [and] if additional discovery becomes available you will be advised promptly." CAJA 270. Under *Strickler*, Lewis's defense counsel was entitled to "reasonably rely on" that representation to mean just what it said: that "all materials the State [wa]s constitutionally obligated to disclose" either did not exist or would be produced if later discovered. *Strickler*, 527 U.S. at 283 n.23. Having been assured that no such *Brady* material existed, defense counsel was under no obligation to spend precious resources investigating whether the prosecutor in fact possessed material exculpatory information. But by adopting a rule that transforms the prosecutor's

"affirmative duty" to disclose exculpatory information, *Kyles*, 514 U.S. at 432, into a purely voluntary one so long as the information may be found elsewhere, the decision below squarely conflicts with *Strickler*.[2]

In *Banks*, the State likewise withheld impeachment materials about a key witness, despite stating that it would disclose all discoverable *Brady* material. *Banks*, 540 U.S. at 693. Once again, this Court rejected such a gambit. It held that the Court's "decisions lend no support to the notion that defendants must scavenge for hints of undisclosed *Brady* material when the prosecution represents that all such material has been disclosed." *Id.* at 695. And with a holding that all but answers the question presented in this case, the Court held that any "rule thus declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process." *Id.* at 696.

3. *Brady*, *Strickler*, and *Banks* all confirm that a criminal trial is not an opportunity for a prosecutor to play hide-and-seek with exculpatory or impeachment materials. The prosecution is constitutionally duty-bound to turn over—and not

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[2] Although this Court reserved decision on whether the analysis would change if the defendant knew about and could reasonably discover how to obtain specific withheld documents, *id.* at 288 n.33, its holding in *Strickler* did not turn on whether the defendant could have discovered a factual basis for its claims; the fact that the prosecution withheld evidence and the defendant relied on assertions that all evidence had been disclosed was enough to establish cause for not raising a *Brady* claim in state court proceedings. See *id.* at 289 (summarizing the holding without mentioning any obligations for the defendant beyond relying on the prosecution's statements).

suppress—all such materials in its possession, regardless of whether, how, or if defense counsel might independently know to look for and be able to uncover similar information through launching an independent investigation into the matter. This Court, in short, has never held that a prosecutor may circumvent his *Brady* obligations simply because the evidence may lurk elsewhere in the public domain.

The Sixth Circuit, however, has done just that. In *Bell*, and again in *Lewis*, the Sixth Circuit mistakenly focused on the defendant's ability to find the information some other way—rather than on whether the prosecution had suppressed materials in its possession. The *Bell* court dismissed *Strickler* and *Banks* as not controlling because those cases did not involve information akin to the public sentencing records at issue in *Bell*. 512 F.3d at 235. That court's holding—that a defense counsel must scour the public record as well as canvas all available sources for exculpatory or impeachment material and is precluded from relying on a prosecutor's assurances that all *Brady* materials have been disclosed—squarely conflicts with this Court's precedents.

Where this Court has consistently rejected gamesmanship by prosecutors in these circumstances, the Sixth Circuit has chosen to invite more of it. The *Bell* and *Lewis* decisions effectively carve out of the government's duty to disclose a vast array of materials that may be obtainable from another source—thereby forcing defense counsel to jump down rabbit hole after rabbit hole, even when the prosecutor has promised all *Brady* material has been disclosed.

The decision below turns this Court's decisions in *Brady* and its progeny on their head: whereas this Court consistently places the burden of disclosure on the prosecution and permits defense counsel to rely on assurances of full disclosure, the Sixth Circuit requires defense counsel to invest the time, energy, and resources required to verify whether the prosecutor really meant it when he said that all *Brady* material had indeed been disclosed. Allowing such a game of hide and seek directly contradicts this Court's well-established precedent and threatens to reintroduce the type of prosecutorial gamesmanship supposedly eradicated by *Brady*. The Court should grant the petition to resolve that conflict. *See* S. Ct. Rule 10(c) (one of the principal considerations governing the exercise of certiorari jurisdiction is whether a court of appeals "has decided an important question in a way that conflicts with the relevant decisions of this Court").

II. THE RULING BELOW INTENSIFIES AN ALREADY DEEP DIVISION AMONG THE CIRCUITS

The Sixth Circuit's decision deepens an entrenched circuit split over whether a State may disregard its *Brady* obligations whenever the evidence is theoretically available somewhere in the public record. Lewis was denied his habeas claim below because the Sixth Circuit excused the prosecution's failure to turn over the NCIC report documenting decades of criminal and fraudulent activity by its key witness on the theory that Lewis could have obtained the NCIC report some other way. App. 5a.[3] That

[3] Because defense counsel do not generally have access to the NCIC database, which can be accessed only by limited groups of users—mostly law enforcement—the court seems to

same rule has been embraced by the First, Second, Third, Seventh, Eighth, and Eleventh Circuits. In sharp contrast, the Fourth, Fifth, Ninth, and Tenth Circuits have reached the opposite result. The practical impact of this sharp 7-4 split is that prosecutors in some states are licensed to withhold certain exculpatory or impeachment evidence, while their counterparts in neighboring states are constitutionally obligated to disclose the exact same type of evidence. Fundamental due-process rights should not turn so arbitrarily on accidents of geography. This Court should grant certiorari to resolve this intractable conflict. *See Braxton* v. *United States*, 500 U.S. 344, 347 (1991) (a "principal purpose for which we use our certiorari jurisdiction * * * is to resolve conflicts among the United States courts of appeals.").

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have held that defense counsel would have had to independently search the public records of every jurisdiction in which Bishop had a criminal record as of 1992, including Indianapolis, Indiana; Batavia, New York; Angola, New York; Tampa, Florida; La Grange, Kentucky; Dayton, Ohio, Charleston, West Virginia; Michigan City, Indiana; Gallatin, Tennessee, to recreate the NCIC report that the prosecution failed to disclose. CAJA 167-184. *See, e.g.*, *United States* v. *Fowler*, 2007 WL 2156560, at *8 (E.D. Wis. July 25, 2007) ("Unlike defense counsel, the government has access to these records through the NCIC system."). Alternatively, this particular criminal defense attorney could possibly have used his status as an adjunct professor at the Tennessee Law Enforcement Training Academy to request that his "contacts" there run an NCIC report on Bishop for him, although defense counsel was unsure the Academy's computer was capable of running an NCIC report. CAJA 146.

A. Four Circuits Have Ruled—Contrary To The Sixth Circuit's Holding—That A Prosecutor's Duty To Disclose Exculpatory Evidence Is Absolute And Does Not Turn On Whether The Evidence Is Publicly Available.

The decision below squarely conflicts with the four courts of appeals that have concluded that the due-process analysis under *Brady* focuses on whether prosecutorial misconduct occurred—not on whether defense counsel could have mitigated the harm from that misconduct through independent investigation. These courts hold that whether a *Brady* violation occurs turns on three, and only three, factors: whether "(1) the prosecution suppressed evidence, (2) the evidence was favorable to the defendant, and (3) the evidence was material." *United States* v. *Quintanilla*, 193 F.3d 1139, 1149 (10th Cir. 1999); *see, e.g.*, *Walker* v. *Kelly*, 195 Fed. Appx. 169, 174-175 (4th Cir. 2006); *Johnson* v. *Dretke*, 394 F.3d 332 (5th Cir. 2004); *Gantt* v. *Roe*, 389 F.3d 908, 913 (9th Cir. 2004). In these courts, the analysis focuses solely on whether the prosecutor concealed documents or materials it was required to disclose under *Brady* without any inquiry into where those documents or materials existed outside the prosecutor's files.

Fourth Circuit. In *Walker*, the prosecutor argued that, even though he had withheld material exculpatory information from the defendant, there was nevertheless no *Brady* violation "since [the defendant] could have reasonably discovered all the information" from other sources. *Walker*, 195 Fed. Appx. at 175. The Fourth Circuit initially agreed, relying on earlier decisions that adopted a rule that

was virtually indistinguishable from the one endorsed by the Sixth Circuit in *Lewis* and *Bell*. *See, e.g.*, *United States* v. *Wilson*, 901 F.2d 378, 381 (4th Cir. 1990) ("[W]here the exculpatory information * * * lies in a source where a reasonable defendant would have looked, a defendant is not entitled to the benefit of the *Brady* doctrine."). But on remand from a GVR instructing the Fourth Circuit to reconsider in light of this Court's decision in *Banks*, 546 U.S. 1086 (2006), the Court of Appeals held that the prosecutor had violated *Brady* by failing to disclose exculpatory evidence—regardless of whether it was publicly available or not.

In reaching that result, the Fourth Circuit announced a rule that squarely conflicts with the approach that the Sixth Circuit has embraced. It held that the proper analysis "focuses on prosecutorial misconduct, not on the defendant's diligence." *Walker*, 195 Fed. Appx. at 175. Any other focus, the court explained, would "condone[ ] the prosecutor's ability to conceal documents and require[ ] a defendant to search for Brady material." *Id.* That is particularly true—as in Lewis's case—where the prosecutor affirmatively assures the defendant that no exculpatory evidence exists. As the Fourth Circuit emphasized, a defendant is "reasonable not only in relying on the presumption that the Commonwealth would faithfully perform its duty to disclose, but also in relying on the explicit representation that the prosecution had disclosed all *Brady* material." *Id.* at 174.

Fifth Circuit. The Fifth Circuit likewise does not recognize a public-availability exception to *Brady*. In *Johnson* v. *Dretke*, the State neglected to disclose a stipulation in which a co-defendant confessed to

being the triggerman. The State tried to justify its *Brady* violation by pointing out that the stipulation was available in the public record, but the Fifth Circuit flatly rejected the argument. Instead, it adopted a bright-line and easy-to-administer rule that gives full effect to the "affirmative duty" that prosecutors have to disclose exculpatory material under this Court's precedents: "If the State fail[s] under a duty to disclose the evidence, then its location in the public record, in another defendant's file, is immaterial." *Johnson*, 394 F.3d at 337; *see Mathis* v. *Dretke*, 124 Fed. Appx. 865, 877 (5th Cir.), *cert. denied*, 545 U.S. 1131 (2005) (the State "ha[s] no duty to disclose exculpatory evidence that was available in the public record.").

Ninth Circuit. The Ninth Circuit, like the Fourth and Fifth Circuits, holds that the duty to disclose under *Brady* is a duty of the State, and its violation is determined solely by analyzing the State's conduct. *See, e.g.*, *Gantt*, 389 F.3d at 913. In *Gantt*, as in Lewis's case below, the prosecutor assured defense counsel that all *Brady* material had been turned over, when in fact some exculpatory evidence had been withheld. On behalf of a unanimous panel, Judge Kozinksi held that, while a more diligent defense counsel might have been able to independently obtain the information, that "does not absolve the prosecution of its *Brady* obligations." *Id.* at 913. That was particularly so because defense counsel "was surely entitled to rely on the prosecution's representation that it was sharing the fruits of the police investigation." *Id.*; *see also Atkins* v. *County of Riverside*, 151 Fed. Appx. 501, 504 n.2 (9th Cir. 2005) (access to allegedly fabricated evidence did not "absolve[] the government of any

Brady duty of disclosure" to inform defense counsel of alleged fabrication for impeachment purposes).

Tenth Circuit. The Tenth Circuit's precedents hew to this same rule. In that circuit, "whether a defendant knew or should have known of the existence of exculpatory evidence is irrelevant to the prosecution's obligation to disclose the information." *United States* v. *Quintanilla*, 193 F.3d 1139, 1149 (10th 1999); *see also Banks* v. *Reynolds*, 54 F.3d 1508, 1517 (10th Cir. 1995) ("the prosecution's obligation to turn over the evidence in the first instance stands independent of the defendant's knowledge"); *Scott* v. *Mullin*, 303 F.3d 1222, 1229 (2002) ("It is not a petitioner's responsibility to uncover suppressed evidence."). The Tenth Circuit's decision in *Banks* directly rejected the State's argument that the availability of another source could defeat the prosecution's duty to disclose under *Brady*; in so holding, the Tenth Circuit acknowledged that its rule (the same rule applied in the Fourth, Fifth and Ninth Circuits) conflicts with the rule applied in other circuits. 54 F.3d at 1517 n.17. This Court should grant certiorari to resolve that conceded conflict.

B. Seven Circuits Hold That Whether A State May Suppress Evidence Under *Brady* Turns On Where Else That Evidence Might Exist.

On the other side of the circuit split, the First, Second, Third, Sixth, Seventh, Eighth, and Eleventh Circuits hold a State's suppression of evidence in violation of *Brady* may be excused if the defendant could theoretically have come across the evidence some other way.

The Third Circuit has held that a State has no duty to provide a defendant with information that "with any reasonable diligence he can obtain himself." *United States* v. *Pelullo*, 399 F.3d 197, 213 (3d Cir. 2005). Applying that standard in *United States* v. *Joyce*, 257 Fed Appx. 501, 504-505 (3d Cir. 2007), the Third Circuit ruled that prosecutors who "fail[ed] to disclose [a potential witness's] conviction and produce summaries of its interviews with him" nevertheless "did not suppress" evidence in violation of Brady. *Id.* at 504. The court reasoned defense counsel should have "periodically searched the criminal dockets of the federal district courts in the Eastern District of Pennsylvania or the District of New Jersey, the two jurisdictions in which they knew, or could have known with reasonable diligence, that [the potential witness] was under criminal investigation." *Id.* at 505. In the Third Circuit, it is "fatal" to a *Brady* claim if the defendant had "knowledge of, or access to, purportedly exculpatory material." *Pelullo*, 399 F.3d at 215.[4]

The Eleventh Circuit has adopted this same approach. *See United States* v. *Meros*, 866 F.2d 1304,

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[4] The Third Circuit has shifted course from its original view of this issue, which focused on the "annoying frequency with gamesmanship by some prosecutors with respect to the duty to disclose." *United States* v. *Oxman*, 740 F.2d 1298 (3d Cir. 1984), *vacated by United States* v. *Pflaumer*, 473 U.S. 922 (1985). *Compare Oxman*, 740 F.2d at 1312 ("[I]t is not the law that exculpatory evidence in the government's file is not *Brady* material if the defendant might have uncovered it through independent sources."), *with Joyce*, 257 Fed. Appx. at 504 ("It is well-established that *Brady* does not impose upon the Government the duty to provide a defendant 'with any information which he already has or, *with any reasonable diligence*, he can obtain himself.' ") (internal citations omitted).

1309 (11th Cir. 1989) ("[T]he government is not obliged under *Brady* to furnish a defendant with information which he already has or, with any reasonable diligence, he can obtain himself.") (internal quotations omitted). The court has gone so far as to hold that the defense's mere knowledge of a potential exculpatory witness excuses the State from its duty to disclose exculpatory statements made by the witness. *See Jennings* v. *McDonough*, 490 F.3d 1230, 1238 (11th Cir. 2007) 1238; *accord United States* v. *Griggs*, 713 F.2d 672 (11th Cir. 1983) (refusing to recognize a *Brady* claim when the defendant had knowledge of the witness who allegedly made an exculpatory statement even though the State failed to produce the statement in response to the defense's specific request for it).

The Second Circuit likewise has ruled that "[e]vidence is not 'suppressed' if the defendant either knew, or should have known, of the essential facts permitting him to take advantage of any exculpatory evidence." *Disimone* v. *Phillips*, 461 F.3d 181, 197 (2d Cir. 2006); *see United States* v. *Paulino*, 445 F.3d 211, 226 (2d Cir. 2006); *United States* v. *Jackson*, 345 F.3d 59, 73 (2d Cir. 2003).

Whether the suppressed evidence is publicly available factors into the due process analysis in the First, Seventh, and Eighth Circuits as well. In *United States* v. *Rodriguez*, 162 F.3d 135, 147 (1st Cir. 1999), the First Circuit held that "[t]he government has no *Brady* burden when the necessary facts for impeachment are readily available to a diligent defender, as they were here." *See also Lugo* v. *Munoz*, 682 F.2d 7, 9 (1st Cir. 1982) (prosecution has no duty to disclose evidence that is "a matter of public record" and "readily available to a

diligent defender"); *Ellsworth* v. *Warden*, 333 F.3d 1, 6 (1st Cir. 2003). In *Harris* v. *Kuba*, 486 F.3d 1010 (7th Cir. 2007), the Seventh Circuit held that the State did not suppress evidence under *Brady* where it reasoned that the defense "had evidence that the same weapon was used in the three crimes" and therefore could have discovered the exculpatory evidence from other sources. *Id.* And finally, in *United States* v. *Jones*, 160 F.3d 473, 479 (8th Cir. 1998), the Eighth Circuit held that "information available from other sources or evidence already possessed by a defendant is not covered by the rule" announced in *Brady*. *See United States* v. *Whitehead*, 176 F.3d 1030, 1036 (8th Cir. 1999).

III. THIS CASE PRESENTS AN IDEAL VEHICLE FOR RESOLVING THE ELEVEN-CIRCUIT SPLIT.

The facts of this case cleanly present the issue that has divided the lower courts: whether a prosecutor can suppress exculpatory or impeachment material from the defendant if the material is arguably discoverable by the defendant through some other avenue. This issue significantly shapes the fairness of criminal trials, imposes unrealistic burdens on criminal defendants, and threatens to undermine the core holding of *Brady*, *Strickler*, and *Banks*. And the effect of the Sixth Circuit's rule will be felt on a daily basis in countless disclosure decisions made by prosecutors on the front lines of the criminal justice system.

The dispute in this case revolves around a single piece of evidence: an NCIC report that would have established the exact contours of the three-decade-long criminal record of the prosecution's "key witness." The rule adopted by the Sixth Circuit, and

the other courts on its side of the circuit divide, places significant burdens on already-strained defense counsel, requiring them to independently search throughout criminal dockets and other public records around the country just to unearth evidence already in the State's hands. This rule is profoundly unfair to defendants and returns the law to a time when prosecutorial gamesmanship was tolerated. It requires defendants to duplicate the efforts of the State, thereby unnecessarily draining a defense counsel's resources. Faced with limited resources and immense caseloads,[5] defense counsel must spend even less time developing the defendant's case and instead must divert that effort to retracing the prosecutor's steps, making a vigorous defense more difficult. Prosecutors may affirmatively withhold exculpatory or impeachment material that may be technically available somewhere else, all the while misleading the defendant so that the defendant has no reason to conduct its own independent investigation.

If the decision below stands, an earnest but overwhelmed defense counsel faces a Hobson's choice: he can expend his scarce resources either to

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[5] A defense counsel working in the Legal Aid Society of New York's Bronx office, for example, maintains an open file of approximately 105 cases (50 felonies and 55 misdemeanors) at any given time. The Spangenberg Group, Status of Indigent Defense in New York: A Study for Chief Judge Kaye's Commission on the Future of Indigent Defense Services 131 (2006). Public defenders in Louisiana and Massachusetts face maximum workload standards of 200 felonies and 400 to 450 misdemeanors per year, and public defenders in Oregon can expect to handle up to 240 felonies and 400 misdemeanors per year. *See generally id.* at App. K (providing public defender workload standards for fifteen states).

verify the prosecutor's assurances that all available *Brady* material has been turned over, or he can prepare a more thorough defense for his client. The former denies defense counsel the opportunity to thoroughly prepare a defense, and the latter risks never finding exculpatory evidence withheld by the prosecution. The Sixth Circuit's rule is antithetical to a "system constitutionally bound to accord defendants due process," *Banks*, 540 U.S. at 696, and warrants prompt, decisive resolution by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted. In the event the Court grants the petition in *Bell*, No. 07-1506, it may wish to consolidate this case with *Bell*. At the very least, this Court should hold the petition in this case pending the disposition of the petition in *Bell*.

Respectfully submitted,

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APPENDIX A

[Filed Mar. 14, 2008]

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NO. 05-5661

ROGER DALE LEWIS,
Petitioner-Appellant,

v.

STATE OF TENNESSEE,
Respondent-Appellee.

On Appeal from the United States District Court
for the Middle District of Tennessee

BEFORE: SUHRHEINRICH, SUTTON, and GRIFFIN, Circuit Judges.

SUHRHEINRICH, Circuit Judge. Roger Dale Lewis appeals from the order of the district court granting the Respondent, State of Tennessee's motion to dismiss his habeas petition. This Court granted a certificate of appealability on two issues: (1) whether the State failed to turn over material exculpatory evidence concerning its key witness, Ernest Bishop; and (2) whether the State knowingly allowed Bishop to commit perjury without taking steps to correct the false testimony. We AFFIRM.

I. Background

Lewis was convicted of arson in state court in 1993. The key witness at his trial was Ernest Bishop, a so-called "jailhouse snitch." Prior to trial, Petitioner's trial counsel submitted a discovery request for "any and all evidence in possession of the State or in possession of any governmental agency that might be termed favorable," including, but not limited to, evidence "to impeach the credibility of any witness the government intends to call." The request specifically cited *Brady v. Maryland*, 373 U.S. 83 (1963). The motion also requested discovery regarding any agreement, promise or understanding between the State and any of its witnesses, citing *Giglio v. United States*, 405 U.S. 150 (1972). The state prosecutor responded to the discovery motion, but he did not provide a copy of Bishop's National Crime Information Center (NCIC) report, which details charges dating back to 1961, including attempted rape, breaking and entering, and theft, as well as the use of numerous aliases.

At trial Bishop was asked during cross examination if he had been convicted of any felony in the last ten years. Bishop replied: "I don't think so. I'm not sure." Bishop acknowledged that he was awaiting extradition to Texas on a sexual assault charge. Defense counsel also asked whether he had ever worked for the police "before in the past, given them information that's helped you out in some of the sentencing, some of the things you don't remember you did?" Bishop said that he had not.

Petitioner was convicted on five counts of aggravated arson, and sentenced to a term of thirty years. The conviction and sentence were affirmed on direct

appeal to the Tennessee Court of Criminal Appeals. *See State v. Lewis*, No. 01C01-9494-CR-00135, 1995 WL 10510 (Tenn. Crim. App. Jan. 12, 1995). On December 29, 1997, the Tennessee Supreme Court reversed four of Petitioner's aggravated arson convictions as barred by double jeopardy and remanded the case for resentencing on the remaining conviction. *State v. Lewis*, 958 S.W.2d 736 (Tenn. 1997). On remand, the trial court sentenced Petitioner to twenty-one years in prison. That sentence was affirmed. *See State v. Lewis*, No. M1998-00543-CCA-R3CD, 1999 WL 1296005 (Tenn. Crim. App. Dec. 30, 1999); *State v. Lewis*, 44 S.W.3d 501 (Tenn. 2001).

In post-conviction proceedings, Petitioner argued that he had been denied *Brady* material, namely Bishop's NCIC report and Bishop's reputation as a "jailhouse snitch." Petitioner also argued that the State failed in its duty to correct Bishop's perjured testimony concerning deals made with the State in return for his testimony in Petitioner's trial. The post-conviction court denied the petition and the Tennessee Court of Criminal Appeals affirmed the post-conviction court's disposition. *See State v. Lewis,* No. M2002-02439-CCA-R3-PC, 2003 WL 22438526 (Tenn. Crim. App. Oct. 28, 2003). Petitioner did not seek leave to appeal to the Tennessee Supreme Court.

On March 2, 2004, Petitioner filed *pro se* this habeas action. On March 25, 2005, the district court denied Petitioner's habeas petition, but granted a partial certificate of appealability regarding his *Brady* and prosecutorial misconduct claims. Petitioner filed a timely *pro se* notice of appeal, and a *pro*

se brief, whereafter this Court appointed counsel to file a supplemental brief.

II. Analysis

Petitioner's appeal is governed by the Anti-terrorism and Effective Death Penalty Act of 1996 (AEDPA). Under the AEDPA, a writ will not be granted unless the state adjudication on the merits resulted in a decision that either (1) "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States"; or (2) "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d); *Williams v. Taylor*, 529 U.S. 362, 404-5 (2000). However, if the state court did not rule on an issue, our review is de novo. *Morales v. Mitchell*, 507 F.3d 916, 929 (6th Cir. 2007).

The state courts' factual findings are presumed correct unless proven to the contrary by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). We review the district court's ultimate denial of habeas relief de novo. *Combs v. Coyle*, 205 F.3d 269, 277 (6th Cir. 2000).

A. Brady Claim

Petitioner argues that the State suppressed material evidence regarding its key witness' criminal record and reputation as a "jailhouse snitch" in violation of *Brady*, and that the state court's decision that the impeachment evidence was not material is an unreasonable application of clearly established federal law.

As noted, the Tennessee Court of Criminal Appeals held that Petitioner failed to establish a *Brady* violation because the alleged impeachment evidence was not material, and did not decide whether the evidence otherwise satisfied the *Brady* test. *See Strickler v. Greene*, 527 U.S. 263, 281-82 (1999) (noting that to establish a *Brady* claim, a defendant must prove that the evidence was (1) favorable to the accused, (2) suppressed by the state, and (3) material). Thus, in ascertaining whether the State's conduct met the other facets of the *Brady* test, our review is de novo. *See Morales*, 507 F.3d at 929.

This Court's recent decision in *Bell v. Bell*, 512 F.3d 223 (6th Cir. 2008) (en banc), answers that question. There we held that the state's failure to turn over the sentencing records of a government witness was not a *Brady* violation because those records were publicly available and the petitioner could have obtained them. *Id.* at 235. As was the case in *Bell*, Bishop's testimony derived from evidence he acquired while in prison with Petitioner, and Bishop further acknowledged on cross-examination that he was subject to extradition to Texas. Petitioner therefore "easily could have pursued any pending charges against [Bishop] and their disposition." *Id.* Thus, because the factual basis for Petitioner's claim was easily available from another source, the government was under no duty to supply that information to Petitioner. *See id.* (and citations therein).

B. Prosecutorial Misconduct

Petitioner also claims that Bishop testified falsely and that the State failed to correct that perjured testimony. Petitioner's assertion is based on Bishop's negative response to the question of whether he

had ever worked for the police in the past or received some consideration in sentencing.

First, he contends that Bishop received a reduced sentence on a theft charge in return for his testimony against him. On direct appeal Petitioner asserted a claim that Bishop received special treatment in exchange for his testimony. The Tennessee Court of Criminal Appeals held that Petitioner's arguments were "not supported by fact or legal authority," and that there were "no citations to authority to support his argument in his brief." *Lewis*, 1995 WL 10510, at *3. Thus, the court ruled that Petitioner had waived the issue, citing Rule 10(b) of the Rules of the Tennessee Court of Criminal Appeals. *See Lewis*, 1995 WL 10510, at *3.

Petitioner reasserted the latter claim in his post-conviction request for relief as a predicate for the prosecutorial misconduct claim. The Court of Criminal Appeals held that the issue had been waived on direct review because "petitioner could have introduced the pleadings related to Bishop's plea agreement and sentencing" as well as "subpoena[ing] members of the prosecution team regarding any promises made to Bishop." *Lewis*, 2003 WL 22438526, at *12. Thus, the trial court's ruling was "final," *id.*, and therefore "previously determined by the original trial court" after a "full and fair hearing," *id.* (citing Tenn. Code Ann. § 40-30-206(h)), and thus "not subject to further review by this court." *Id.* The Court of Criminal Appeals ruled in the alternative that the claim failed on the merits. *Id.* at 12-13.

The district court reviewed the claim on the merits. However, this was error because the district court

incorrectly determined that the Tennessee Court of Criminal Appeals' decision did not rely solely on the state procedural bar. The merits review by the Court of Criminal Appeals was an alternative holding. *See id.* at 12 (stating that "[e]ven if this issue were properly before us, . . . we would reject it . . . "). "An alternative holding in which a state procedural bar is a sufficient basis for the state court's judgment is adequate to preclude a claim from being raised on habeas review, even when the state court also relies on federal law." *Simpson v. Jones*, 238 F.3d 399, 408-09 (6th Cir. 2000); *see also Michigan v. Long*, 463 U.S. 1032, 1041 (1983) (stating, in the context of a direct appeal, that "[i]f the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision"); *Harris v. Reed*, 489 U.S. 255, 264 n.10 (1989) (applying *Long* rule to habeas claims, stating that "a state court need not fear reaching the merits of a federal claim in an *alternative* holding"; further noting that "[b]y its very definition, the adequate and independent state ground doctrine requires the federal court to honor a state holding that is a sufficient basis for the state court's judgment, even when the state court also relies on federal law"). In short, because the Tennessee Court of Criminal Appeals relied on the direct appeal determination that the claim was waived, federal review of this claim is barred. *See Alley v. Bell,* 307 F.3d 380, 388-89 (6th Cir. 2002).

Petitioner's assertion that Bishop worked for the police in the past was also not supported by the evidence. Petitioner supported this perjury allega-

tion with a 1994 federal appellate decision in which Bishop was described as a government witness, *see United States v. Johnson*, 16 F.3d 1222 (6th Cir. 1994) (unpublished per curiam). The Tennessee Court of Criminal Appeals found no evidence in the record or in the *Johnson* opinion to support the claim. *Lewis*, 2003 WL 22438526, at *10.[1] As the district court noted, the *Johnson* opinion identifies Bishop as a government witness, but does not otherwise explain his relationship with the government. In short, as the district court found, the state court of appeals' ruling was not contrary to federal law or an unreasonable determination of the facts.

III. Conclusion

The judgment of the district court is **AFFIRMED.**

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[1] The Tennessee Court of Criminal Appeals did not alternatively rule that this claim was procedurally defaulted. *See Baze v. Parker*, 371 F.3d 310, 320 (6th Cir. 2004) (holding that if a state court does not expressly rely on a procedural deficiency, the federal court may conduct habeas review). Furthermore, the state does not contend on appeal that this issue is procedurally defaulted. *See id.*

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 04-5523

STEPHEN M. BELL,
Petitioner-Appellant,
v.

RICKY BELL, Warden,
Respondent-Appellee.

Appeal from the United States District Court
for the Middle District of Tennessee at Nashville.
No. 95-00600—William J. Haynes, Jr.,
District Judge.

Argued: June 6, 2007

Decided and Filed: January 4, 2008

Before: BOGGS, Chief Judge; MARTIN, BATCHELDER, DAUGHTREY, MOORE, COLE, CLAY, GILMAN, GIBBONS, ROGERS SUTTON, COOK, McKEAGUE, and GRIFFIN, Circuit Judges.

COUNSEL

ARGUED: Gretchen L. Swift, FEDERAL PUBLIC DEFENDER'S OFFICE, Nashville, Tennessee, for Appellant. Joseph F. Whalen III, OFFICE OF THE

ATTORNEY GENERAL, Nashville, Tennessee, for Appellee. **ON BRIEF**: Gretchen L. Swift, Jude T. Lenahan, FEDERAL PUBLIC DEFENDER'S OFFICE, Nashville, Tennessee, for Appellant. Joseph F. Whalen III, OFFICE OF THE ATTORNEY GENERAL, Nashville, Tennessee, for Appellee.

OPINION

GIBBONS, J., delivered the opinion of the court, in which BOGGS, C.J., BATCHELDER, ROGERS, SUTTON, COOK, McKEAGUE, and GRIFFIN, JJ., joined. CLAY, J. (pp. 13–24), delivered a separate dissenting opinion, in which MARTIN, MOORE, COLE, and GILMAN, JJ., joined, with MOORE, J. (p. 25), also delivering a separate dissenting opinion, in which MARTIN, COLE, and CLAY, JJ., joined. DAUGHTREY, J. (p. 26), delivered a separate opinion dissenting in part and concurring in part.

JULIA SMITH GIBBONS, Circuit Judge. Petitioner-appellant Stephen Michael Bell [1] was convicted in Tennessee state court of one count of first degree murder and one count of second degree murder. After unsuccessfully pursuing relief in the Tennessee appellate courts, Bell sought a writ of *habeas corpus* in federal district court. The district court denied Bell's petition but issued a certificate of appealability as to Bell's claims that the prosecution in his case violated *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to turn over impeachment material and that he received ineffective assistance of counsel.

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[1] Because petitioner and respondent share the same last name, we refer to petitioner as "Bell" and respondent as "the Warden."

Bell appealed, and a divided panel of our court reversed the district court as to Bell's *Brady* claim. *Bell v. Bell*, 460 F.3d 739 (6th Cir. 2006). A majority of the active members of the court voted for rehearing *en banc*, vacating the original panel decision.

For the reasons below, we affirm the decision of the district court denying Bell *habeas* relief.

I.

The Tennessee Court of Criminal Appeals set forth the facts underlying Bell's conviction:

> The victims, Herman Harrison Wallace, a/k/a Mad Dog, and his wife, Jean Lynn Wallace, were street people who camped under the bridges along the Cumberland River. The defendant, Michael Bell, a/k/a Monk, a street person, camped between the Wallaces and Nashville's Riverfront Park.
>
> Ronald Harrington, a street person, met the defendant on the railroad tracks near the camp sites on September 6, at approximately 3:00 p.m. Defendant was shirtless, wearing Levi's, a pair of shoes or boots and had a gun in his hand. Chained to his belt, was a billfold similar to that carried by truck drivers. The gun was either a .32 or .38 caliber revolver. Defendant appeared to be under the influence and stated that he had been "coking[."] During this exchange the defendant asked Mr. and Mrs. Harrington to take care of his dog if anything happened to him.
>
> Edward Stansbury, an admitted alcoholic, testified that he spent the night of September 5, 1986, with friends on the river. The next morning he left but

returned to the camp of Gary Hedges in the afternoon. At approximately 4:30 p.m. they noticed a man come up a path with a shiny black dog on a leash. The leash was a choker chain with a leather belt. When the man got to within twenty feet he spoke identifying himself as "Monk" and inquiring if "Mad Dog" and Jean were home. He walked down to the Wallaces' tent and entered. Up to this point he, Stansbury, had no reason to commit to memory the man's clothing or facial features.

As Stansbury and Hedges continued to sit they heard the sounds of dogs fighting and people arguing in the Wallaces' camp, then they heard a muffled shot. Jean Wallace ran out of the tent screaming "He has killed my dog, he has killed my dog[.'] She turned and re-entered the tent. Stansbury heard a distinctive gun shot and saw Jean Wallace backing out of the tent. As she cleared the entrance she fell and there were two more shots. He was sure he had seen the man fire the last shot. The man had been right behind Mrs. Wallace at the entrance. The man left the tent and left the scene. As the man was leaving he attempted to reload his pistol.

Stansbury described the culprit as 6'2" or 6'1", lanky, wearing fairly new blue jeans, a black baseball cap over his eyes, a sleeveless Levi jacket and T-shirt. His arms were tattooed. He had a billfold with a chain which appeared attached to a belt loop.

At a line-up conducted near the crime scene in the fading evening light, Stansbury was hesitant to identify the man in the number two spot. He was

certain as to the man's jeans and nearby dog. While testifying he said he was still confused about the man's beard; he thought the culprit had short dark hair, but everything else about the number two man, the defendant, "fit to a tee[."]

Robert Moore, a Metropolitan Police Department homicide officer, arrived at the Wallaces' camp. He viewed the body of Mrs. Wallace and was directed to four shell casings that were lying on the ground. The soil in the area was fairly loose and the shell casings, covered with a chalky gray substance, were on top of the soil. Upon closer examination he was able to detect the smell of gun powder.

Officer Moore was advised that Mr. Wallace had been moved to General Hospital and although he appeared to have been shot as many as three times, only one slug had been found at the hospital. The officers at the crime scene made an extensive search and were able to recover a slug from the bloody mattress within the tent where Mr. Wallace had lain when shot.

After talking with Hedges and Stansbury and getting a general description of the suspect, the officers broadcasted a pick-up. Other detectives took the defendant in[to] custody and returned him to an area near the crime scene. Due to the fading light in and around the camp sites and under the bridges, other officers were setting up a line-up of street type people in an open area nearby. Officer Moore explained that facial identification was not that strong at the crime scene, but clothing details and the overall characteristics of the participants were strong in the witnesses' minds.

Officer Mark Wynn and two other officers responded to a call that a man fitting the description of the suspect was believed to be in the area of Fessler's Lane and Hermitage Avenue. They observed the suspect sitting on the curb and drinking a beer. He had a dog with him. He was taken in[to] custody and found to have six unspent .38 caliber Special Winchester 158 grain bullets in his pants pockets, but no weapon was found. He was concerned about the dog so the officers agreed to transport the dog to the place of the line-up. (A picture of the dog wearing the choke chain and belt leash was shown the jury.)

Sergeant Tommy Jacobs testified that shortly after 5:30 p.m., September 6, 1986, he visited the camp site of the defendant and recovered eleven spent .38 caliber shell casings and a Winchester ammunition box that were lying on the ground. A holster was also recovered at the camp site. Later at the police station Sergeant Jacobs read the defendant his Miranda rights. When told he would be charged with murder, the defendant responded that he had not shot anyone, had not shot a gun and had never shot a gun.

Officer Darryl Ryan performed a nitric acid test on the defendant's hands. The swabs were sent to the crime laboratory.

Officer Archie Spain was sent to General Hospital. He took possession of a .38 caliber slug that was laying beside Mr. Wallace's body in the emergency room.

The State introduced testimony from three laboratory technicians. The first technician had

examined the defendant's clothing for blood stains but found none. The second technician, a criminalist, had examined the swabs from the defendant's hands for gunshot residue. This technician testified that "antimonium, barium and lead indicative of gunshot residue was found in significant concentrations on exhibit 5, hand swabs. These results indicate that the subject could have fired or handled a gun."

The third technician was a firearm examiner. He identified the two lead slugs filed earlier as exhibits as being fired from the same firearm. He had disassembled one of the live cartridges taken from the defendant's pockets to compare the lead to the other lead slugs. He was of the opinion the three were from the same manufacturer. The eleven spent shells taken from defendant's camp site were compared with the four spent shells recovered at the victims' camp site. Based upon his microscopic examination he was of the opinion they all had been fired from the same firearm.

The medical examiner testified in detail as to two gunshot wounds found upon Jean Wallace's body. In his opinion either one of these would have caused her death. From his examination of Herman Wallace, he concluded that death was the result of a saddle pulmonary embolus. a blood clot caused by the gunshot wounds which occluded the artery to the lungs.

The State rested its case in chief. Defendant's motion for judgments of acquittal [was] overruled.

Defendant testified that on the morning of September 6, 1986, he went to Riverfront Park.

There he met two men with whom he pooled his money for the purchase of a fifth of wine. He and one of the men moved about in that general area of town during which time the man mentioned having a .38 caliber pistol but needed shells. They went to Service Merchandise where this person purchased a box of cartridges upon signing the log and entering an identification number. They returned to Riverfront Park and then to defendant's camp site where defendant did target practice with the man's pistol. At noon he went to lunch and returned to the camp. The men were still at his camp. Later defendant walked to Lebanon Road and Fessler's Lane where he was arrested.

He acknowledged being brought back to the Riverfront Park. He testified that he did not know he was in a line-up. When shown a picture of the line-up he identified one participant as the man who purchased the shells that morning.

Defendant explained that his statement to Sergeant Jacobs of having never fired a gun had reference to a gun used to murder someone. He was unable to explain why he had first said his dog had been with him all day and changed to say the dog was not with him all day. He denied shooting the Wallaces.

The State called Billy Joe Camden as a rebuttal witness. This was the man who had purchased the box of shells at Service Merchandise on lower Broadway. Camden made the purchase at the request of the defendant. While they were together the defendant did not have his dog with him. After the purchase of the ammunition they went their separate ways. He did not go to the

defendant's camp site nor witness him fire a gun. He was taken from Riverfront Park for the line-up. Camden testified that he owned a .22 caliber rifle but never owned a .38 caliber pistol.

State v. Bell, No. 88-138-II, 1989 WL 86583, at *1-4 (Tenn. Crim. App. Aug. 4, 1989). After hearing closing arguments and deliberating, the jury returned verdicts of guilty on both murder counts against Bell. Bell was sentenced to life in prison for the first degree murder of Jean Lynn Wallace and received a consecutive twenty-year sentence for the second degree murder of Herman Harrison Wallace.

Also among the state's witnesses at Bell's trial was William Davenport, a convicted felon held with Bell in the Nashville jail during the period prior to Bell's trial. In September 1986, Davenport contacted the Davidson County District Attorney General's Office by letter, indicating that he had information about the Bell case. On October 13, 1986, Ronald Miller, the prosecutor assigned to Bell's case, met with Davenport. Notes taken by Miller during that meeting document Davenport's report that Bell admitted murdering the Wallaces. They also suggest that Davenport desired a transfer into a different facility, the "Red Building," and movement into a work release program. The notes also seem to refer to Davenport's parole eligibility status. In November 1986, following Miller's meeting with Davenport, the district attorney's office, through a separate attorney, elected not to prosecute four criminal counts pending against Davenport. Davenport received concurrent sentences on two remaining charges.

When called by the government at Bell's March 1987 trial, Davenport testified that Bell said that he shot Herman Wallace during the course of an argument in which Bell was inebriated or "messed up." According to Davenport, Bell said that he shot Jean Wallace because "she was there" and expressed no remorse for either killing. Bell's defense counsel, Ross Alderman, attacked Davenport's account on cross-examination, suggesting that Davenport was an incredible witness due to his criminal history and his prior Ku Klux Klan membership. During his closing argument, Alderman again challenged Davenport's veracity, emphasizing Davenport's criminal history and parole status. Miller attempted to undermine Alderman's implication that Davenport had an incentive to lie to the jury and denied that Davenport's decision to testify had anything to do with any promises from his office. He stated at closing, "Mr. Alderman would have you believe that [Davenport] wants an early parole through our office or through me. Well, I don't have any say-so with the Parole Board; they are going to let him go soon enough anyway. I have nothing to do with what they do in their own respective realms." Shortly after Bell's trial, however, Miller did send a letter to the Board of Pardons and Parole on Davenport's behalf requesting parole "at the earliest possible date." Davenport was granted early parole in June 1987.

Following his conviction, Bell filed a direct appeal to the Tennessee Court of Criminal Appeals, raising a number of claims. The appeals court denied the appeal on all grounds on August 4, 1989, and the Tennessee Supreme Court denied Bell's petition for review on November 6, 1989. Bell then sought post-

conviction relief in state court. On November 2, 1992, the trial court denied him relief, and the Tennessee Court of Criminal Appeals affirmed the trial court's denial on August 4, 1994. Bell sought permission to appeal to the Tennessee Supreme Court, but the state supreme court denied his appeal on January 3, 1995.

On June 12, 1995, Bell filed a *pro se* petition for a writ of *habeas corpus* in the United States District Court for the Eastern District of Tennessee. The court transferred Bell's petition to the United States District Court for the Middle District of Tennessee. After the court denied Bell's motion for partial summary judgment on March 31, 1997, there was no further action in the case for more than a year, and, as a result, the court dismissed the case without prejudice on October 23, 1998. Bell moved to reopen the case, and the court granted the motion on June 2, 1999. In an amended petition, filed September 6, 2000, Bell alleged fourteen constitutional violations. Two of those claims are relevant to the matter before us. Bell argued that the prosecution violated the Fourteenth Amendment by withholding favorable evidence from him in contravention of *Brady*, thereby depriving him of due process. He further claimed a violation of his Sixth Amendment right to the effective assistance of counsel, alleging that his trial counsel were ineffective for failing to investigate his history of alcoholism and mental illness and to place those issues before the jury as factors undermining the government's proof of premeditation. The government thereafter moved to dismiss the petition, and the district court granted that motion on April 26, 2002, as to nine of Bell's claims on procedural default grounds. As to the remainder

of Bell's claims—including his *Brady* and ineffective assistance claims—the court decided that their resolution would require discovery.

The district court conducted an evidentiary hearing on January 22 and 27, 2004. On January 22, Bell introduced an expert report prepared by Dr. Pamela Mary Auble. Dr. Auble's report detailed Bell's lengthy history of alcohol and drug abuse and his mental health problems. The report concluded that Bell's intoxication or mental illness could have compromised his mental state at the time of the Wallace murder, thus eliminating his ability to engage in a premeditated killing. Alderman testified at the hearing that he did investigate Bell's mental health history and alcoholism but defended his decision not to pursue these issues as a possible defense tactic because Bell insisted upon his innocence and wanted Alderman to assert an identity defense, that is, that Bell was not the killer. In addition, Alderman represented that because Bell had been ruled competent to stand trial, he could not prevail on a theory of insanity. Finally, Alderman testified that, although he submitted a discovery request to the government prior to trial, he received no information concerning Davenport's communications with the prosecution or his criminal background. Nevertheless, Alderman acknowledged that he knew that Davenport was seeking early parole and that he had been able to argue at closing that Davenport provided testimony in order to receive the benefit of early parole.

At the hearing's continuation on June 27, Miller testified. He conceded many of the facts related to his interactions with Davenport. However, Miller

expressly denied promising Davenport anything in exchange for his testimony. In explaining his decision to submit a letter to the parole board on Davenport's behalf, Miller stated, "I didn't promise Davenport anything, and I didn't make any agreements with him, but he testified at trial against someone I thought was dangerous, and I felt that he would now be labeled as a snitch, and it might be best that I did whatever I could do to get him out of prison, whenever the parole board thought he would be eligible."

On March 26, 2004, the district court issued a written order denying all of Bell's remaining claims. As to Bell's *Brady* claim, the court ruled that Miller's letter to the parole board was created after trial and thus could not have been disclosed pretrial. The court determined that the prosecution should have turned over the materials tending to prove that Davenport was seeking favors from the government in exchange for his testimony but held that Bell had not shown that the omission of these documents deprived him of a fair trial. With respect to Bell's claim that his counsel was deficient, the court held that Alderman did adequately investigate Bell's history of substance abuse and blackouts and ordered a pretrial mental evaluation of Bell. Because Bell was found competent to stand trial and because Bell insisted on his innocence, Alderman pursued a defense based on identity. The district court concluded that this tactical decision was consistent with Sixth Amendment standards. Bell appealed to this court after receiving a certificate of appealability from the district court on his *Brady* and Sixth Amendment claims.

On appeal, a divided panel of our court reversed, concluding that the prosecution unlawfully withheld evidence of a tacit agreement between Davenport and Miller, the notes documenting Miller's meeting with Davenport, and sentencing records from the separate criminal proceedings against Davenport. Concluding that there was a reasonable probability of a different result had these materials been properly disclosed, the panel granted relief on Bell's *Brady* claim. The panel affirmed the denial of Bell's ineffective assistance of counsel claim. The Warden successfully sought rehearing *en banc*, and the original panel decision was vacated.[2]

II.

A.

In assessing the correctness of the district court's decision on Bell's petition, we evaluate the district court's factual findings for clear error and review the district court's ultimate refusal to grant *habeas* relief *de novo*. *Combs v. Coyle*, 205 F.3d 269, 277 (6th Cir. 2000). As to the standard applicable to any relevant

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[2] Judge Moore's dissenting opinion questions the justification for granting *en banc* review in this case, asserting that the case does not present a question of exceptional public importance but only a difference of opinion as to what facts permit the inference of a tacit agreement. As explained *infra* at note 6, it is precisely the panel majority's conclusion that the facts of this case permit such an inference that would create a new definition of *Brady* material and a new legal rule broadly applicable in federal criminal prosecutions as well as *habeas* proceedings. If the panel majority's opinion remained as binding precedent, the impact would be enormous. While ordinarily factual issues do not merit *en banc* rehearing, this one does.

state court rulings, Bell asserts that the highly deferential review standard set forth in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (1996), does not apply to his claims because he filed his initial petition before the enactment of the statute. *See Williams v. Taylor*, 529 U.S. 362, 402 (2000). The Warden responds that the district court dismissed Bell's original petition without prejudice, and Bell's amended petition was filed after AEDPA's effective date. Therefore, argues the Warden, AEDPA applies.

The parties' dispute is immaterial. In the present case, AEDPA's applicability is relevant only to the extent that we must review a state court's ruling on Bell's claims. As explained *infra*, Bell failed to present either of his claims to the state courts, and there is, therefore, no state court decision on these issues for us to review. We accordingly apply *de novo* review to Bell's constitutional claims. *See Dyer v. Bowlen*, 465 F.3d 280, 284 (6th Cir. 2006).

B.

Bell seeks *habeas* relief on the ground that the prosecution failed to turn over impeachment materials relating to William Davenport, a government witness. In *Brady*, the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87. A succesful *Brady* claim requires a three-part showing: (1) that the evidence in question be favorable; (2) that the state suppressed the relevant evidence,

either purposefully or inadvertently; (3) and that the state's actions resulted in prejudice. *See Strickler v. Greene*, 527 U.S. 263, 281-82 (1999).[3]

Bell cites three items that he contends constituted favorable impeachment evidence subject to disclosure under *Brady*. First, Bell points to notes Miller

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[3] The Warden argues that we are not permitted to entertain Bell's *Brady* claim because he failed to present it to the state courts prior to bringing his claim in federal court and his claim is now procedurally defaulted. For his part, Bell does not contest the Warden's representation that he did not assert a *Brady* violation in state court. Under both the pre-AEDPA and AEDPA regimes, Bell was required to exhaust the remedies available to him in Tennessee's courts prior to seeking relief in federal court. *See* 28 U.S.C. § 2254(b) (1994); 28 U.S.C. § 2254(b)(1)(A) (1996). Where a petitioner fails to exhaust his state remedies "and the court to which the petitioner would be required to present his claim in order to meet the exhaustion requirement would now find the claims procedurally barred . . . there is a procedural default for purposes of federal *habeas* . . . ." *Coleman v. Thompson*, 501 U.S. 722, 735 n.1 (1991) (emphasis added). Because Tennessee law limits an inmate to only one postconviction petition, Tenn. Code Ann. § 40-30-102(a), Bell is precluded from returning to state court to exhaust his *Brady* claim properly, and his claim is therefore procedurally defaulted. A *habeas* petitioner who defaults on his federal claims in state court is barred from bringing those claims in federal court unless he "can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrates that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman*, 501 U.S. at 750. As the Supreme Court explained in *Banks v. Dretke*, the cause and prejudice standard tracks the last two elements of a *Brady* claim: suppression by the government and materiality. 540 U.S. 668, 691 (2004) (citing *Strickler*, 527 U.S. at 282). We therefore choose to focus our attention on the merits of Bell's claim with the understanding that our decision on the merits resolves any issues as to procedural default.

took during his October 1986 meeting with Davenport. Those notes reveal that Davenport sought consideration for his assistance in the proceedings against Bell. Second, Bell argues that the prosecution was obligated to turn over the sentencing records from the case against Davenport. Those records show that the district attorney decided not to prosecute Davenport on two charges of grand larceny and two charges of concealing stolen property. They also show that Davenport received concurrent sentences on two additional criminal charges. Third, Bell claims that Davenport and Miller had an implied agreement or understanding that Miller would seek early parole for Davenport in exchange for his inculpatory testimony against Bell. That agreement, Bell argues, was subject to disclosure pursuant to the Supreme Court's decision in *Giglio v. United States*, 405 U.S. 150 (1972). We consider each of these items in light of the three-part test outlined above.

1.

The *Brady* rule applies to evidence that is exculpatory in nature as well as evidence that a defendant could use at trial to impeach a government witness. *See United States v. Bagley*, 473 U.S. 667, 676-77 (1985). As to the notes from Miller's October 1986 meeting with Davenport, we agree with the district court that the prosecution was under an obligation to turn those notes over to Bell prior to trial. The documents from that meeting include four notations of significance: (1) an indication that Davenport unilaterally contacted the district attorney's office to provide assistance in the Bell case; (2) a note that Davenport "want[ed] to go to the Red

Building"; (3) what appears to be an outline of Davenport's scheduled prison release dates; and (4) a reference to a work release program. Collectively, Miller's notes, though cryptic, confirm that Davenport sought out the district attorney's office and provide support for the claim that he requested preferential treatment—in the form of a facility transfer or work release—in return for his assistance. This information is proper impeachment material and should have been disclosed to Bell prior to trial. *See United States v. Risha*, 445 F.3d 298, 303 n.5 (3d Cir 2006) ("There can be no dispute that the information in question is favorable to the defense because [a witness's] expectation of lenience in the state proceedings could have been used to impeach him."). The sentencing documents arising out of the proceedings against Davenport are also impeachment material, qualifying as evidence of his prior convictions, and should have been disclosed. *See Crivens v. Roth*, 172 F.3d 991, 998 (7th Cir. 1999) ("We conclude, therefore, that the state did, as a matter of law, improperly withhold [witness's] criminal history record from [defendant].")

We take a different view, however, of Bell's assertion of a tacit agreement or "understanding" that was subject to disclosure under *Brady*. It is well established that an express agreement between the prosecution and a witness is possible impeachment material that must be turned over under *Brady*. *Giglio*, 405 U.S. at 154-55. The existence of a less formal, unwritten or tacit agreement is also subject to *Brady*'s disclosure mandate. *See, e.g., Wisehart v. Davis*, 408 F.3d 321, 323-24 (7th Cir. 2005). If Bell could prove that Davenport and Miller had reached a mutual understanding, albeit unspoken, that Daven-

port would provide testimony in exchange for the district attorney's intervention in the case against him, such an agreement would qualify as favorable impeachment material under *Brady*. On the record before us, however, we are unable to conclude that such an agreement existed here.

In support of his assertion of an implied agreement, Bell relies in part on the notes from Miller's discussion with Davenport on October 3, 1986. He argues, in addition, that the events following this meeting—specifically, the resolution of the case against Davenport—confirm the existence of an agreement between Davenport and Miller. The record confirms Bell's claim that Davenport contacted the district attorney's office in the hope of receiving a benefit in exchange for his assistance. Indeed, Miller testified at the evidentiary hearing before the district court that, although he was not certain what Davenport wanted, "[e]verybody wants something, and I'm sure Davenport wanted something."

The fact that Davenport desired favorable treatment in return for his testimony in Bell's case does not, standing alone, demonstrate the existence of an implied agreement with Miller. A witness's expectation of a future benefit is not determinative of the question of whether a tacit agreement subject to disclosure existed. *See id.* at 325 ("[W]hat one party might expect from another does not amount to an agreement between them."). Although Davenport may have been seeking more lenient treatment in his own case, we find no evidence of a corresponding assurance or promise from Miller. Miller testified at the evidentiary hearing before the district court

that he did not promise Davenport anything in exchange for his testimony, stating unequivocally that he "made no agreements with Mr. Davenport at all." When asked at his parole hearing about Miller's letter to the parole board and Davenport's participation in the Bell case, Davenport stated that he "got nothing out of that whatsoever."

Nor do we believe that the handling of Davenport's case after his meeting in October 1986 proves the existence of an understanding. As to the disposition of the six counts pending against Davenport, Bell does not direct us to any reliable evidence that the prosecutor or judge assigned to Davenport's case had any awareness that Davenport was planning to render assistance in the Bell case.[4] Without evidence to the contrary, one could just as reasonably conclude that the result in Davenport's case merely reflects the standard operations of the criminal justice system, in which the state offers leniency to defendants in exchange for their pleas of guilty. *Cf. Wisehart*, 408 F.3d at 324 ("[M]ost criminal cases are disposed of pursuant to plea agreements that involve concessions on [the government's] part."). Moreover, Bell relies too heavily upon Miller's subsequent decision to transmit a letter to the parole board. In his letter, Miller mentions Davenport's cooperation in the case against Bell, but also notes the threat of possible retaliation by other prisoners as a reason for

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[4] Bell notes in his brief that the attorney prosecuting Davenport's case, Katie Novak, "later became Miller's wife," implying that Novak was somehow complicit in the purported arrangement between Davenport and Miller. Bell's bare suggestion is not enough to convince us that this was the case, however.

granting Davenport early parole. In light of Miller's sworn statement before the district court that he had no agreement with Davenport, we have no reason to believe that an undisclosed agreement was the true reason for Miller's letter to the parole board.

In sum, although we do not take issue with the principle that the prosecution must disclose a tacit agreement between the prosecution and a witness, it is not the case that, if the government chooses to provide assistance to a witness following a trial, a court must necessarily infer a preexisting deal subject to disclosure under *Brady*. "The government is free to reward witnesses for their cooperation with favorable treatment in pending criminal cases without disclosing to the defendant its intention to do so, *provided* that it does not promise anything to the witnesses prior to their testimony." *Shabazz v. Artuz*, 336 F.3d 154, 165 (2d Cir. 2003) (emphasis in original). To conclude otherwise would place prosecutors in the untenable position of being obligated to disclose information prior to trial that may not be available to them or to forgo the award of favorable treatment to a participating witness for fear that they will be accused of withholding evidence of an agreement.

Bell has not adequately demonstrated the existence of an understanding between Davenport and Miller concerning his testimony at Bell's trial. "Without an agreement, no evidence was suppressed, and the state's conduct, not disclosing something it did not have, cannot be considered a *Brady* violation." *Todd v. Schomig*, 283 F.3d 842, 849 (7th Cir. 2002).[5] The

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[5] Bell also argues that Miller's letter to the parole board was *Brady* material. However, as the district court correctly

result advocated by Judge Clay in his dissenting opinion would create a new definition of *Brady* material that includes possible post-trial witness favorable treatment—something never previously considered by any court to be within *Brady*'s ambit.[6]

2.

We next consider whether a *Brady* violation occurred because the prosecution did not disclose the favorable evidence–the sentencing records and the notes from Miller's 1987 meeting. With respect to the sentencing records, the Warden argues that those records were publicly available and that Bell could have obtained access to them.

The Warden is correct that the sentencing records were available to Bell. Moreover, because Davenport's testimony derived from statements Bell made to him while they were in jail together, Bell easily could have pursued any pending charges against Davenport and their disposition. In fact, Davenport mentioned a pending charge as a reason for his incarceration during his testimony. Under such circumstances, our court has made clear that a

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observed, Miller drafted that letter after Bell's trial and could not have disclosed it pretrial. The letter is useful to Bell only as evidence of a possible agreement between Davenport and Miller concerning Davenport's testimony. For the reasons set forth above, we do not believe that the materials Bell cites, including the letter, amount to proof of an understanding, implied or otherwise.

[6] Such an expansion of the definition of *Brady* has legal implications as well as factual ones. And because prosecutors so frequently use cooperating witnesses in criminal trials, the practical effect of such a definition is great.

Brady violation does not occur. *See Matthews v. Ishee*, 486 F.3d 883, 891 (6th Cir. 2007) ("Where, like here, 'the factual basis' for a claim is 'reasonably available to' the petitioner or his counsel from another source, the government is under no duty to supply that information to the defense.") (citation omitted); *Coe v. Bell*, 161 F.3d 320, 344 (6th Cir. 1998) (There is no *Brady* violation where information is available to the defense "because in such cases there is really nothing for the government to disclose.").

The dissent faults the majority's reliance on our case law regarding withheld information that is readily available to the defense from another source. Instead, it says that this issue is controlled by two Supreme Court cases: *Strickler* and *Banks*. The dissent reasons that *Strickler* and *Banks* compel the conclusion that a *Brady* violation occurred because the prosecutor in this case represented to Bell's counsel that he had turned over all discoverable information in his file.

In our view, *Strickler* and *Banks* do not call our precedents into question and do not counsel a conclusion that there was a *Brady* violation with respect to the nondisclosure of the sentencing records. Neither case involves information remotely similar to the public sentencing records not given to the defense in this case. Rather, both involve information known to investigating officers that defendants had no reason to know about and that could not have been discovered by defendants without an extensive and possibly fruitless investigation. In *Strickler*, the withheld information consisted of notes taken by a detective during interviews with a key witness and

letters from the witness to the detective. 527 U.S. at 266 & 273-75. In *Banks*, the undisclosed evidence included the status of one witness as a paid police informant who had provided information about the defendant's involvement in the case and interviews that police and prosecutors conducted with another witness who denied in his testimony that he had spoken to anyone about his testimony. 540 U.S. at 675-76. Given these facts, the Supreme Court readily concluded that Strickler and Banks had shown cause for failing to present their *Brady* claims in state court because they had reasonably relied on the prosecutor's open file policy and assertions during state proceedings that everything known to the government had been disclosed.[7] *Strickler*, 527 U.S. at 289; *Banks*, 540 U.S. at 698.

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[7] As previously mentioned, the Supreme Court observed in *Banks* that the cause and prejudice standard tracks the last two elements of a *Brady* claim: suppression by the government and materiality. 540 U.S. at 691 (citing *Strickler*, 527 U.S. at 282). The cause analysis adopted by the Court includes examination of whether a defendant reasonably relied on the government's representation. *Id.* at 692 (citation omitted). Similarly, analysis of whether material was suppressed by the government involves consideration of reasonable reliance. *Id.* at 698. *Cf. Jennings v. McDonough*, 490 F.3d 1230, 1238-39 (11th Cir. 2007) ("[T]here was no suppression of [a] tape" where defendant had knowledge of a witness and "had within his knowledge information by which he could have ascertained her statement."); *Gantt v. Roe*, 389 F.3d 908, 913 (9th Cir. 2004) ("Though defense counsel could have conducted his own investigation, he was surely entitled to rely on the prosecution's representation that it was sharing the fruits of the police investigation."). The terminology provides opportunity for confusion, however, because the government's withholding of evidence does not necessarily mean that it has suppressed the evidence for purposes of ascertaining whether a *Brady* violation has occurred. And whether a *Brady* violation is ultimately

By contrast, in this case the known fact of Davenport's incarceration strongly suggested that further inquiry was in order, whether or not the prosecutor said he had turned over all the discoverable evidence in his file, and the information was a matter of public record. *See Matthews*, 486 F.3d at 890-91 (concluding that witness's withdrawal of original guilty plea, plea to reduced charges, and resentencing were public information and that government could not have "disclosed" information "readily available to the defense"); *Spirko v. Mitchell*, 368 F.3d 603, 611 (6th Cir. 2004) (holding that where evidence is available

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found is not determinative of the extent of the prosecutor's broad duty to disclose exculpatory evidence. The Court itself recognized in *Strickler* the differing uses of the terms:

> This special status explains both the basis for the prosecution's broad duty of disclosure and our conclusion that not every violation of that duty necessarily establishes that the outcome was unjust. Thus the term *"Brady* violation" is sometimes used to refer to any breach of the broad obligation to disclose exculpatory evidence—that is, to any suppression of so-called *"Brady* material"—although, strictly speaking, there is never a real *"Brady* violation" unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict. There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.

527 U.S. at 281-82. In this opinion we use the term *"Brady* violation" in the strict sense of the term. Thus, saying that a particular nondisclosure was not a *Brady* violation in no way suggests that the prosecutor did not have a duty to disclose the information.

from sources other than the state and defendant was "aware of the essential facts necessary for him to obtain that evidence," the *Brady* rule does not apply). The absence of reasonable reliance distinguishes this case from *Strickler* and *Banks*.

3.

Turning to the notes from Miller's 1987 meeting with Davenport, which were not otherwise available to Bell, we examine whether the failure to disclose those notes amounted to constitutional error. The Supreme Court has held that error of constitutional magnitude occurs only when the production of the evidence would have created a "reasonable probability" of a different result. *Bagley*, 473 U.S. at 682. As the Court noted in *Kyles v. Whitley*:

> The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A "reasonable probability" of a different result is accordingly shown when the government's evidentiary suppression "undermines confidence in the outcome of the trial."

514 U.S. 419, 434 (1995) (quoting *Bagley*, 473 U.S. at 678). Thus, if Bell can show that "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict," he will prevail. *Id.* at 435.

Without question, Miller's notes would have provided support for the defense theory that Davenport expected some benefit in return for his testimony against Bell and was therefore not a credible witness.

Despite the absence of the notes, however, Alderman did challenge the purity of Davenport's motives during his closing argument, stating:

> [Y]ou have got to decide whether you want to believe somebody who was on parole, violated that parole, was in jail, all this involving a crime involving fraud and false dealings, theft— . . . . I [Davenport] want you to believe [my testimony] . . . because I have got a parole hearing coming up in a matter of months and if I can go to the Parole Board and I can say, 'I have helped convict Stephen Michael Bell,' that they might cut me some slack because they violated my last parole when I committed another crime . . . . That is why I called the District Attorney's office; that is why I spoke to the police and the District Attorney and that is why I came to testify, but you believe me.

The notes from Davenport's meeting with Miller could have bolstered Bell's credibility attack on Davenport's motives, but any assistance would have been modest. The jury was apprised of Davenport's status and the possible other reasons for his decision to testify, namely, that he wished to secure early parole as a result of his participation in the Bell case. Documentation would not have permitted the development of alternate theories or different lines of argument. Thus, the inclusion of the withheld material could not "reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles*, 514 U.S. at 435.

We conclude, therefore, that Miller's notes from his meeting with Davenport were not material, and the district court correctly denied relief on Bell's *Brady* claim.

C.

Bell also claims that his trial counsel rendered ineffective assistance of counsel. Because we agree with the original panel's resolution of this issue, affirming the district court's denial of relief on Bell's claim, we reinstate the original panel decision as to that claim. *See Getsy v. Mitchell*, 495 F.3d 295, 315 (6th Cir. 2007); *Rubin v. Schottenstein, Zox & Dunn*, 143 F.3d 263, 270 (6th Cir. 1998).

III.

For the foregoing reasons, we affirm the judgment of the district court denying Bell's claim for *habeas* relief.

DISSENT

CLAY, Circuit Judge, dissenting. In its effort to avoid the conclusion that the state violated *Brady v. Maryland*, 373 U.S. 83, 87 (1963), the majority makes three basic missteps. First, the majority disregards the reasoning of the Supreme Court and blames Petitioner for refusing to discover evidence the prosecution said did not exist. Second, the majority ignores the weight of the evidence and the absence of findings by the district court, and instead holds that no tacit agreement existed between William Davenport and the prosecution. Finally, the majority concludes that the prosecution's withholding of evidence was not prejudicial, thereby implying that because Petitioner made an impeaching argument, it was irrelevant that he was deprived of the evidence to support it. I disagree with the majority on all three points, and therefore respectfully dissent.

I.

The facts recounted by the majority and the Tennessee Court of Appeals are generally correct. Rather than repeat a lengthy recitation of the facts, I will limit this discussion to those aspects insufficiently developed by the majority.

Petitioner's trial was held on or about the beginning of March, 1987. At trial, the prosecutor, Ronald Miller, called Davenport as a witness against Petitioner. Davenport claimed that Petitioner approached him in jail and asked what "they would do on a double murder." J.A. at 256. Petitioner

allegedly proceeded to discuss the charges in detail, recounting that he had gotten into an argument over his dog with Herman Wallace. Davenport stated that Petitioner admitted that he had been intoxicated, and had ended up shooting Mr. Wallace. Petitioner also allegedly confessed to shooting Jean Wallace, who was Mr. Wallace's wife, because "she was there." J.A. at 257. Davenport testified that Petitioner did not seem remorseful about killing the two people.

On cross-examination, Petitioner brought out Davenport's five felony convictions for charges includeing forgery, fraud, and receiving and concealing stolen property. Davenport admitted that he was familiar with the criminal justice system, that he was currently incarcerated, and that he had a parole hearing on December 5, 1987. Davenport also admitted that he at one time adhered to the beliefs of the Ku Klux Klan.

During closing, Petitioner argued that Davenport lacked credibility because of his convictions for crimes involving fraud and false dealings, and because of his membership in the Klan. He also contended that Davenport should not be believed because Davenport had

> a parole hearing coming up in a matter of months and if [he] can go to the Parole Board and [he] can say, "I have helped to convict Stephen Michael Bell," that they might cut [him] some slack. . . . That is why [he] called the District Attorney's office; that is why [he] spoke to the police and the District Attorney and that is why [he] came to testify.

J.A. at 275.

Miller argued in favor of Davenport's credibility during closing. According to Miller, Davenport testified because Petitioner "came there and told him what had happened and he had no remorse and no sorrow whatsoever and that is why he [Davenport] was in here testifying and telling you what he heard." J.A. at 277. Miller also claimed that though "[Petitioner] would have you believe that [Davenport] wants an early parole through our office or through me," Miller did not "have any say-so with the Parole Board; they are going to let him go soon enough anyway. I have nothing to do with what they do in their own respective realms." J.A. at 277. The jury convicted Petitioner for the first-degree murder of Mrs. Wallace, and the second-degree murder of Mr. Wallace.

On March 19, 1987, approximately two weeks after Petitioner's trial, Miller sent a letter to the Board of Pardons and Paroles requesting that Davenport "be considered for parole at the earliest eligible date." J.A. at 501. Miller stated that "the State did not have a strong case without the testimony of William Davenport" and that "[p]rior to talking to Mr. Davenport, we did not have any idea as to the motive for the killings." J.A. at 501. According to Miller, early parole was justified on account of Davenport's cooperation and the possibility of retaliation from other prisoners. In June of 1987, the Board granted Davenport parole, apparently in advance of his release eligibility date.[1]

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[1] The record is unclear as to when exactly Davenport was eligible for parole. At Petitioner's trial, Davenport testified that his parole eligibility date was December 5, 1987. A

After pursing a direct appeal and state post-conviction relief, Petitioner brought a petition for a writ of habeas corpus. The district court concluded that an evidentiary hearing was necessary to resolve certain issues raised by Petitioner, including the *Brady* issue. The court accordingly held an evidentiary hearing in January of 2004.

At the evidentiary hearing, Miller's testimony revealed that Davenport had initiated contact with the prosecution by sending a letter to the district attorney that was eventually passed on to Miller.[2] Miller had met with Davenport on October 3, 1986, after receiving Davenport's letter. Miller's notes from that meeting (the "Notes") indicate that Davenport "want[ed] to go to [the] Red Building," which was a preferred minimum security facility, and that he was interested in work release. The Notes also suggest a discussion of Davenport's prior convictions, as well as the date that Davenport would be eligible for parole.

Though Miller could not remember many of the specifics of his conversation with Davenport, he acknowledged that Davenport wanted something in exchange for his testimony. Miller denied, however, making any agreements with Davenport. Miller stated that he wrote the letter to the parole board on behalf of Davenport because "he testified at trial

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handwritten note on a copy of the letter written by Miller suggests a parole eligibility date of November 25, 1987.

[2] This letter is not in the record, and counsel for Petitioner stated at oral argument that the letter disappeared while in possession of the state, and has never been disclosed to Petitioner.

against someone I thought was dangerous, and I felt that he would now be labeled as a snitch, and it might be best that I did whatever I could do to get him out of prison." J.A. at 475. Though Miller stated that the case against Petitioner would have proceeded to trial without Davenport's testimony, Miller reaffirmed that the state did not have a good case without Davenport.

Ross Alderman, Petitioner's trial attorney, also testified at the evidentiary hearing. His testimony revealed that, although documents reflecting the disposition of Davenport's criminal charges were responsive to Petitioner's *Brady* request, the prosecution did not provide Petitioner any documents concerning Davenport.[3] Instead, the prosecution claimed that it had provided Petitioner with "all discoverable information in [its] file." J.A. at 499. Sometime after trial, Petitioner discovered that the same prosecuting office handling Petitioner's case had *nolle prosequied* four pending criminal charges against Davenport, which consisted of two counts of grand larceny and two counts of concealing stolen property, after Davenport's meeting with Miller but before his testimony at Petitioner's trial. On the same date that the charges were *nolle prosequied*, Davenport pled guilty to writing worthless checks and concealing stolen property, and received prison time to be served concurrently with time he was already serving.

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[3] Specifically, Petitioner asked for "[t]he nature and substance of any preferential treatment given at any time by any state agent, whether or not in connection to this case to any potential witness" and "[t]he FBI and state arrest and conviction records of each witness the state intends to call in this matter." J.A. at 441.

In his post-hearing brief, Petitioner argued that Miller's interactions with Davenport demonstrated an exchange of favorable treatment for testimony that should have been disclosed to Petitioner. This exchange, Petitioner contended, when combined with the evidence of the Notes and Davenport's *nolle prosequied* charges, entitled Petitioner to relief under *Brady*. The district court rejected Petitioner's *Brady* claim. The court concluded that Miller's letter to the parole board did not exist at the time of trial and could not be disclosed, and though the Notes should have been turned over to Petitioner, they were not material under *Brady*. The district court made no findings as to whether a tacit agreement existed between Davenport and Miller, and also failed to analyze Davenport's *nolle prosequied* charges.

A panel of this Court reversed, holding that the evidence of a tacit agreement, the Notes, and Davenport's *nolle prosequied* charges was improperly suppressed under *Brady*. *Bell v. Bell*, 460 F.3d 739, 750-57 (6th Cir. 2006). The Court also concluded that this evidence was material, and therefore Petitioner was entitled to relief under *Brady*. *Id.* at 757-59. Respondent moved for rehearing *en banc*, which this Court granted on December 15, 2006, thereby vacating the panel opinion.

II.

The sole issue is whether Petitioner established a *Brady* violation. I agree with the majority that we review this issue *de novo*, and that the Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1214 (1996), does not constrain our review. Majority Op. at 7.

A.

In *Brady*, the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87. To prevail on a *Brady* claim, a petitioner must establish three elements: (1) "the evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching;" (2) "that evidence must have been suppressed by the State, either willfully or inadvertently;" and (3) "prejudice must have ensued." *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999). Exculpatory and impeaching evidence are measured by the same constitutional standard. *United States v. Bagley*, 473 U.S. 667, 676-77 (1985).

Brady represents a limited departure from our adversarial system, which is justified by the overarching concern that the defendant receives a fair trial. *Id.* at 675 & n.6. The *Brady* rule recognizes that the state's interest "in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Kyles v. Whitley*, 514 U.S. 419, 439 (1995) (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)); *Strickler*, 527 U.S. at 281 (noting the "special role played by the American prosecutor in the search for truth in criminal trials"). Requiring the prosecutor to disclose favorable evidence "tend[s] to preserve the criminal trial, as distinct from the prosecutor's private deliberations, as the chosen forum for ascertaining the truth about criminal accusations." *Kyles*, 514 U.S. at 439.

B.

There is no dispute that both the Notes and the prosecutor's decision to *nolle prosequi* several of Davenport's pending criminal charges constituted favorable impeaching evidence. Likewise, there is no dispute that the prosecution suppressed the Notes. The majority argues, however, that because evidence reflecting the disposition of Davenport's criminal charges was available to Petitioner in the public records, the prosecution did not suppress such evidence. For this reason, the majority refuses to consider the disposition of Davenport's pending criminal charges in its materiality analysis. The majority's holding is erroneous as a matter of law, and it threatens to reintroduce the gamesmanship that *Brady* and its progeny were designed to prevent. Petitioner specifically requested impeaching evidence concerning the criminal arrests and convictions of the prosecution's witnesses, which would have included the disposition of Davenport's criminal charges. The prosecution responded to that request without alerting Petitioner to the existence of these documents, claiming instead that all discoverable documents had been disclosed, despite the fact that the documents were in the prosecution's possession. Accordingly, the prosecution suppressed this evidence, notwithstanding its availability to Petitioner through the public records.

Two Supreme Court cases establish that a prosecutor's false or misleading statement disclaiming the existence of *Brady* material obviates the need for a petitioner to conduct an independent investigation. Such material, if in the prosecution's possession, and if not disclosed, is therefore suppressed under *Brady*,

even if it is available through another source. In *Strickler*, the issue before the Court was whether the petitioner had "cause" for failing to raise his *Brady* claim before the state trial court, 527 U.S. at 283, which, as the Supreme Court has explained, tracks *Brady*'s "suppression" element. *Banks v. Dretke*, 540 U.S. 668, 691 (2004). The warden argued that because facts suggesting the basis for the petitioner's *Brady* claim were publicly available, through trial testimony and a newspaper article, the prosecution's maintenance of an open-file policy that did not include the evidence in question was irrelevant. *Strickler*, 527 U.S. at 284. The Supreme Court rejected this argument. Though the Court disagreed with the warden's contention that the factual basis for the petitioner's claim was publicly available, it did not rely on this fact in crafting the applicable legal standard.[4] *Id.* at 285. Instead, the Court held that the petitioner established cause because (1) "the prosecution withheld exculpatory evidence," (2) "petitioner reasonably relied on the prosecution's open file policy as fulfilling the prosecution's duty to disclose such evidence," and (3) the state asserted that petitioner had received "everything known to the government." *Id.* at 289.

In *Banks*, the Supreme Court reaffirmed and extended *Strickler*, and reversed the Fifth Circuit's

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[4] The Supreme Court declined to reach the question of whether a different result would follow if "the defendant [were] aware of the existence of the documents in question and knew, or could reasonably discover, how to obtain them." *Strickler*, 527 U.S. at 288 n. 33, 119 S.Ct. 1936. This question is not raised by the instant case, because Petitioner was not aware of the existence of Davenport's *nolle prosequied* charges.

holding that the petitioner could not demonstrate cause because he was not diligent in investigating his *Brady* claim. 540 U.S. at 695. The *Banks* Court did not take a position on whether further investigation would have led to the suppressed material; instead, the Court found cause because the prosecution (1) "knew of, but kept back" the *Brady* material; (2) "asserted . . . that it would disclose all *Brady* material;" and (3) confirmed the petitioner's reliance on that representation by denying contrary allegations in state habeas proceedings. *Id.* at 693. In rejecting the warden's argument, *Banks* clearly indicated that a contrary rule "declaring 'prosecutor may hide, defendant must seek' is not tenable in a system constitutionally bound to accord defendants due process." *Id.* at 696 (framing the state's argument that the petitioner was not diligent as an argument that "the prosecution can lie and conceal and the prisoner still has the burden to discover the evidence" and rejecting this argument (alternation and internal citation removed)); *see also id.* at 695 ("Our decisions lend no support to the notion that defendants must scavenge for hints of undisclosed *Brady* material when the prosecution represents that all such material has been disclosed."). The rule emerging from *Strickler* and *Banks* is clear: Where the prosecution makes an affirmative representation that no *Brady* material exists, but it in fact has *Brady* material in its possession, the petitioner will not be penalized for failing to discover that material.

The majority's attempt to distinguish this case from *Strickler* and *Banks* on the basis of "absence of reasonable reliance" is utterly unpersuasive. Majority Op. at 11. Petitioner specifically requested that the prosecution provide impeaching evidence

concerning its witnesses, which would have included Davenport's sentencing documents. Accordingly, when the prosecution did not provide any of those sentencing documents and informed Petitioner that it had provided "all discoverable information in [its] file," J.A. at 499, Petitioner was entitled to "presume that [these] public officials [had] properly discharged their official duties" and that no relevant documents existed. *Banks*, 540 U.S. at 696 (quoting *Bracy v. Gramley*, 520 U.S. 899, 909 (1997)). Under *Strickler* and *Banks*, Petitioner's ability to uncover the disposition of Davenport's criminal charges by searching public records did not relieve the prosecution of its duty to respond honestly and completely to Petitioner's discovery request.

The majority's mischaracterization of *Strickler* and *Banks* is even more egregious in light of the courts of appeals' consistent interpretation of these cases. Several of our sister circuits have recognized that prosecutors cannot knowingly misrepresent that *Brady* material does not exist without running afoul of *Banks* and *Strickler*, see *Jennings v. McDonough*, 490 F.3d 1230, 1239 & n.8 (11th Cir. 2007) (denying *Brady* claim where the petitioner had equal access to the evidence and "there is no allegation that the prosecution actively misled [the petitioner] about the existence of the *[Brady* evidence]"); *Johnson v. Dretke*, 394 F.3d 332, 337 (5th Cir. 2004) ("[I]f the State failed under a duty to disclose the evidence, then its location in the public record, in another defendant's file, is immaterial."); *Gantt v. Roe*, 389 F.3d 908, 912-13 (9th Cir. 2004) ("While the defense could have been more diligent . . . this does not absolve the prosecution of its *Brady* responsibilities. . . . Though defense counsel could have

conducted his own investigation, he was surely entitled to rely on the prosecution's representation that it was sharing the fruits of the police investigation."), as have several separate opinions of this Court. *See United States v. Graham*, 484 F.3d 413, 422 (6th Cir. 2007) (Batchelder, J. dissenting) ("[T]he defense is entitled to rely on the prosecution's representations regarding its compliance with its *Brady* obligations."); *Bell*, 460 F.3d at 767 (panel opinion) (Gibbons, J. dissenting) ("Miller . . . did not disclose . . . Davenport's sentencing documents, . . . which could have been used for impeachment. Thus, the failure to disclose them was contrary to the requirements of *Brady* and its progeny."); [5] *cf. Harbison v. Bell*, 408 F.3d 823, 833 (6th Cir. 2005) (distinguishing *Banks* because there "the prosecution had repeatedly asserted that all *Brady* material was disclosed, but nevertheless continued to conceal such material"); *Puertas v. Overton*, 168 F. App'x 689, 706 (6th Cir. 2006) (unpublished) ("The Supreme Court has repeatedly held that a defendant can reasonably rely on the prosecution's representation that it has disclosed all *Brady* evidence, and that once the prosecution confirms this representation, the defendant is under no further duty to investigate additional *Brady* materials.").

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[5] The authoring judge of the majority opinion originally believed that Davenport's sentencing documents were suppressed by the prosecution, as indicated by her now-vacated panel dissent. She now argues in the majority opinion herein that the sentencing documents were not suppressed by the prosecution. The fact that the judge authoring the majority opinion herein has taken contradictory positions on this issue certainly detracts from the persuasiveness of the majority opinion.

As the majority notes, *Matthews v. Ishee* held that "[w]here . . . 'the factual basis for a claim' is 'reasonably available to' the petitioner or his counsel from another source, the government is under no duty to supply that information to the defense," even though the government had misled the petitioner by assuring the jury that the material in question did not exist. 486 F.3d 883, 891 (6th Cir. 2007) (quoting *Strickler*, 527 U.S. at 283 n. 24). We are not, however, presently bound by *Matthews*. Because an examination of *Matthews* reveals that it misconstrues *Banks* and *Strickler*, we should decline to follow it.

First, *Matthews* misreads the portion of *Strickler* that purportedly supports its conclusion. *Strickler* asserted that the prosecution's open-file policy and refusal to disclose *Brady* material were factors that established "cause" under *Murray v. Carrier*, 477 U.S. 478, 488 (1986), because they constituted "conduct attributable to the Commonwealth that impeded trial counsel's access to the factual basis for making a *Brady* claim." *Strickler*, 527 U.S. at 283. In support of this proposition, *Strickler* quoted *Murray*: "[A] showing that the factual or legal basis for a claim was not reasonably available to counsel *or* that some interference by officials made compliance impracticable, would constitute cause under this standard." *Id.* at 283 n.24 (emphasis added) (internal citations and quotation marks omitted) (quoting *Murray*, 477 U.S. at 488). Clearly *Strickler* was quoting *Murray* to establish that "interference by officials" constituted cause—as discussed above, *Strickler* did not attach legal relevance to the petitioner's potential inability to discover the *Brady* material by following up on the public documents.

Matthews, however, quotes only the "not reasonably available" example of cause highlighted by *Murray*, while ignoring the "interference by officials" example actually at issue in *Strickler*. *See* 486 F.3d at 891.

Furthermore, *Matthews*' analysis is flawed because it draws a distinction between "cases when the government has sole possession of investigative notes or memoranda" and cases based on public information, *id.* at 890-91, notwithstanding *Strickler*'s and *Banks'* implicit rejection of this distinction. In *Banks*, the Court disregarded the warden's argument that the factual basis for the petitioner's claim was available from other sources, *see Banks*, 540 U.S. at 694-96; likewise, in *Strickler*, the Court declined to condition its test on the petitioner's inability to locate the *Brady* material. Instead, the Court crafted a legal rule that focused on whether the prosecutor made false or misleading representations concerning information in its possession. *Strickler*, 527 U.S. at 289; *Banks*, 540 U.S. at 693.

Finally, *Matthews* is inconsistent with the policies that *Brady* and its progeny are intended to promote. Forbidding prosecutors from making false representations concerning information within their possession furthers *Brady*'s goal of fair trials, and is consistent with the "'special role played by the American prosecutor in the search for truth in criminal trials.'" *Banks*, 540 U.S. at 696 (quoting *Strickler*, 527 U.S. at 281). The contrary rule is antithetical to both of these concerns. The *Matthews* rule also encourages the type of unsavory gamesmanship that the Supreme Court has thought unfit for litigation that stakes the defendant's liberty on the jury verdict. *See id.* ("Prosecutors' dishonest

conduct or unwarranted concealment should attract no judicial approbation." (citing *Kyles*, 514 U.S. at 440)).[6]

In this case, Miller represented that there was no discoverable information in his file relating to Davenport. This representation was false or misleading, as his office was in possession of Davenport's sentencing documents. Accordingly, the prosecution suppressed the evidence of its decision to *nolle prosequi* several of Davenport's pending criminal charges.

C.

In *Giglio v. United States*, the Court held that *Brady* required the disclosure of an agreement between the prosecution and its witness. 405 U.S. 150, 154-55 (1972). This rule requires the disclosure of "promises of reward" and "inducements" offered to witnesses. *Bagley*, 473 U.S. at 683-84. The Supreme Court has specifically held that making a promise of reward or inducement contingent on the prosecution's satisfaction does not exempt it from disclosure. *See id.* But beyond this general parameter, the Court has provided little guidance on how broadly or narrowly "promises of reward" or "inducements" should be construed, and no specific instructions on how *Giglio* applies to tacit agreements.

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[6] The majority also relies on *Spirko v. Mitchell*, 368 F.3d 603, 611 (6th Cir. 2004), but that case is inapposite because it did not involve a false or misleading statement made by the prosecution.

The majority, like several of our sister circuits, does not take issue with the general principle that tacit agreements, like explicit agreements, must be disclosed under *Giglio*. *See, e.g.*, *Wisehart v. Davis*, 408 F.3d 321, 323 (7th Cir. 2005) (holding that the witness could be impeached by a "tacit understanding that if his testimony [were] helpful to the prosecution, the state would give him a break on some pending criminal charge"); *United States v. Shaffer*, 789 F.2d 682, 690 (9th Cir. 1986) ("[F]acts which imply an agreement . . . bear on [the witness's] credibility and would have to be disclosed."); *cf. Giglio*, 405 U.S. at 153 n.4 (suggesting that disclosure is required where the United States Attorney's affidavit "contains at least an implication that the Government would reward the cooperation of the witness," which "tend[ed] to confirm rather than refute the existence of some understanding for leniency"). Reading *Giglio* and *Bagley* to require prosecutors to disclose tacit agreements is undoubtedly the correct result, as the same policies justifying the disclosure of explicit agreements also compel the disclosure of tacit agreements. Like explicit agreements, tacit agreements are likely to be relevant to credibility, and therefore should be disclosed to the jury. *See Giglio*, 405 U.S. at 155. Indeed, tacit agreements may be *more* likely to skew the witness's testimony. In the case of an explicit agreement, the testifying witness will know what he can expect to receive in exchange for his testimony, and will know the conditions he must fulfill. When a witness is instead led to believe that favorable testimony will be rewarded in some unspecified way, the witness may justifiably expect that the more valuable his testimony, the greater the reward. *See*

R. Michael Cassidy, *"Soft Words of Hope:"* Giglio, *Accomplice Witnesses, and the Problem of Implied Inducements*, 98 Nw. U. L. Rev. 1129, 1154 (2004) ("The more uncertain the inducement, the greater the witness's incentive to tailor his testimony to please the government, precisely because the witness does not know exactly what he will get for his cooperation, and hopes for the very best."); *cf. Bagley*, 473 U.S. at 683 ("The fact that the [witnesses'] stake was not guaranteed through a promise or binding contract, but was expressly contingent on the Government's satisfaction with the end result, served only to strengthen any incentive to testify falsely in order to secure a conviction.").[7]

The threat of incorrect jury verdicts is further increased by tacit agreements because, when testifying, a witness whose agreement is tacit, rather than explicit, can state that he has not received any promises or benefits in exchange for his testimony. By definition, tacit agreements are not concrete or explicit. *See* Blacks Law Dictionary 325, 1465 (7th ed. 1999) (defining "tacit" as "[i]mplied but not actually expressed; implied by silence or silent acquiescence," and defining "tacit contract" as "[a] contract in which conduct takes the place of written or spoken words in the offer or acceptance (or both)").

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[7] Empirical evidence also supports the conclusion that implicit promises are as likely to skew a witness's testimony as explicit promises. *See* Saul M. Kassin & Karlyn McNall, *Police Interrogations and Confessions: Communicating Promises and Threats by Pragmatic Implication*, 15 Law & Hum. Behav. 233, 248 (1991) ("In short, . . . our data indicate that because people often process information 'between the lines', [explicit and implicit promises and threats] are functionally equivalent in their impact.").

And given the absence of any formal arrangements, a witness's statement that he has no expectation of favorable treatment concerns only his subjective understanding, and cannot typically be demonstrably falsified. Likewise, the prosecutor can argue to the jury that the witness is testifying disinterestedly,[8] which artificially increases the witness's credibility—artificially, that is, because the premise of the argument is false. *See* Cassidy, *supra*, at 1132 (noting that the prosecutor's ability to argue that no benefits have been conferred is advantageous). If the tacit agreement is not disclosed, the defendant is left with only argument, not evidence, to attempt to counter the credibility that improperly accrues to the witness on account of his supposedly pure motive.

In order to guard against these dangers and facilitate *Brady*'s ultimate purpose of ensuring fair trials, this Court should hold that two types of evidence are subject to disclosure. First, any evidence that reasonably suggests that the prosecutor conveyed an expectation of favorable treatment to the testifying witness should be disclosed. *See Shaffer*, 789 F.2d at 690; *Reutter v. Solem*, 888 F.2d 578, 582 (8th Cir. 1989) (holding that the state must disclose evidence of the witness's impending commutation hearing notwithstanding the district court's finding that no agreement existed between the state

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[8] This danger is not hypothetical. Here, the prosecutor implied that Davenport was motivated by altruistic motives. *See* J.A. at 277 (Miller's closing argument) ("Bill Davenport told you that the man [Petitioner] came there [to Davenport in jail] and told him what happened and he had no remorse and no sorrow whatsoever and *that is why he* [Davenport] *was in here testifying and telling you what he heard.*" (emphasis added)).

and the witness); *cf. Giglio*, 405 U.S. at 153. This expectation creates the incentive for false testimony, and the jury should be allowed to consider this evidence and decide for themselves whether the prosecutor's conduct affected the witness's testimony, regardless of whether the witness acknowledges a subjective understanding that he is testifying pursuant to a *quid pro quo* exchange.

Second, the prosecution should be required to disclose any evidence in its possession that suggests that the witness actually harbors an expectation of favorable treatment, regardless of whether the prosecution created such an expectation. *See United States v. Risha*, 445 F.3d 298, 303 n.5 (3d Cir. 2006) ("There can be no dispute that the information in question is favorable to the defense because [the witness's] expectation of leniency in the state proceedings could have been used to impeach him."); *Todd v. Schomig*, 283 F.3d 842, 849 (7th Cir. 2002) ("Todd cannot prove an agreement existed. He argues that at the very least [the witness] had an 'expectation' of benefit. But what one party might expect from another does not amount to an agreement between them. *And Todd does not argue that the state knew of [the witness's] expectation.*" (emphasis added)). *Brady*'s concern is not with prosecutorial bad faith, but with accurate outcomes. *See* 373 U.S. at 87; *see also Bagley*, 473 U.S. at 675. Even if the prosecution was wholly innocent in creating the witness's unfounded impression that favorable testimony would be rewarded, that impression nevertheless has the ability to color the witness's testimony in favor of the prosecution. The prosecution should not be able to knowingly suppress evidence of a witness's expectation of favorable treat-

ment merely because the prosecution did not willfully cultivate it.

Construing "promises of reward" or "inducements" to include these two types of evidence would promote the disclosure of evidence actually likely to bias prosecution witnesses. In contrast to the rule proposed by the majority, which would require something akin to a formal agreement before any evidence was subject to disclosure, *see* Majority Op. at 10; *see also Shabazz v. Artuz*, 336 F.3d 154, 165 (2d Cir. 2003) ("The government is free to reward witnesses for their cooperation with favorable treatment in pending criminal cases without disclosing to the defendant its intention to do so, *provided* that it does not promise anything to the witnesses prior to their testimony."), this rule would foreclose a crafty prosecutor's strategy of eschewing a formal agreement, only to achieve the same result through innuendo or implication. Additionally, it would resolve the nebulous issue of determining whether subjective expectations had given rise to a mutual understanding between the prosecution and the witness by making that issue one for the jury. If the prosecution made statements implicitly offering leniency in exchange for testimony, or if the witness made statements implying that he possessed such an expectation, the jury could consider whether an agreement existed, and weigh the witness's testimony accordingly.

The majority mischaracterizes the rule proposed by the dissent as creating "a new definition of *Brady* material that includes possible post-trial witness favorable treatment." Majority Op. at 11. The rule proposed by the dissent does not require pre-trial

discovery of post-trial witness treatment. Rather, the dissent simply proposes that we adopt the conclusion compelled by *Giglio* and *Bagley*—namely, that the prosecution must disclose evidence of any possible tacit agreements between it and prosecution witnesses prior to trial.

In the case before us, though Miller's testimony at the evidentiary hearing confirms that no explicit agreements existed, his testimony does not preclude the possibility that he conveyed an expectation of lenient treatment that he intended to fulfill. *See* J.A. _ at 475 ("I didn't promise Davenport anything, and I didn't make any agreements with him . . . ."). Similarly, the district court made no factual findings on this matter. If such a mutual understanding occurred, then a tacit agreement existed between Davenport and the prosecution, which was subject to disclosure under *Giglio*, 405 U.S. at 154-55.

The evidence in this case strongly suggests that a tacit agreement existed between the prosecution and Davenport. This inquiry involves the choice between two competing hypotheses: Either the prosecution provided favorable treatment to Davenport because of an implied understanding that valuable testimony would be rewarded, or the prosecution never reached an implied understanding with Davenport, and Davenport independently provided valuable testimony, at which point the prosecutor decided to reward him. If the former occurred, the tacit agreement should have been disclosed; if the latter occurred, no *Brady* violation occurred because no *Brady* material existed. *Compare, e.g., Shaffer*, 789 F.2d at 689, *with Todd*, 283 F.3d at 849.

The first hypothesis is significantly more plausible, for two reasons. First, the course of dealings between the parties suggests that a mutual understanding existed. Davenport approached Miller seeking to provide testimony in exchange for favorable treatment. Miller made a notation of the preferential treatment that Davenport sought. Shortly thereafter, and before Davenport testified, the prosecuting office *nolle prosequied* two counts of grand larceny and two counts of concealing stolen property against Davenport. And approximately two weeks after Davenport provided incriminating testimony and Petitioner was convicted, Miller wrote a letter to the parole board—which accords with the Notes' indication that Davenport's parole date was discussed. This course of conduct is unlikely to be the result of coincidence, thus lending support to the contention that an unstated understanding existed between Miller and Davenport.

Second, neither prosecutors nor jailhouse informants are generally disposed to altruistic behavior, and the fact that a testifying jailhouse witness subjects himself to personal danger makes such behavior even less likely to stem from disinterested motivations. *See* J.A. at 475 (testimony of Miller) ("I felt that [Davenport] would now [after testifying] be labeled as a snitch, and it might be best that I did whatever I could do to get him out of prison."). Prosecutors are aware of this expectation, and have every incentive to encourage it. *See* J.A. at 476 ("Everybody wants something, and I'm sure Davenport wanted something."). The parties' incentives therefore encourage the creation of tacit agreements.

In sum, the record in this case strongly, though not conclusively, suggests the existence of a tacit agreement. Generally speaking, whether the prosecution and the witness reached an unspoken understanding is a factual matter for the state court or federal district court. Here, Petitioner argued before the district court that the record demonstrated a tacit agreement, but the district court made no factual findings on the matter. In light of this record, the majority errs by unjustifiably resolving this factual matter against Petitioner, thereby expounding an unduly restrictive and incorrect view of tacit agreements as a matter of law.[9]

D.

A petitioner can establish prejudice by showing that "there is a reasonably probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Bagley*, 473 U.S. at 682. This standard does not require that it is more likely than not that the verdict would have been different without the evidence, and is substantially less demanding than a sufficiency of the evidence test. *Kyles*, 514 U S. at 434. The prejudicial effect of any favorable evidence suppressed by the state must be viewed cumulatively, as opposed to item-by-item, and if the suppressed evidence collectively establishes prejudice, no harmless error inquiry is necessary. *Id.* at 435-36.

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[9] Even under the majority's erroneous view of prejudice, the case should be remanded so that the district court can resolve this factual issue. However, because the Notes and Davenport's *nolle prosequied* charges establish prejudice under *Brady*, remand is unnecessary.

Davenport's testimony was critical to the prosecution. Petitioner was convicted of first-degree murder with respect to Mrs. Wallace, and Davenport provided the only direct evidence of premeditation, which was a necessary element of the offense. *See State v. Johnson*, 661 S.W.2d 854, 860 n.1 (Tenn. 1983) (quoting Tenn. Code. Ann. § 39-2-202 (defining first degree murder), *repealed*, 1989 Pub. Acts ch. 591, § 1)). Davenport's testimony was also crucial to the prosecution's second-degree murder case because it provided the only direct evidence that Davenport was the shooter, thereby greatly strengthening what was otherwise a weak and entirely circumstantial case.[10]

In light of the state's insubstantial case, the importance of Davenport's testimony cannot reasonably be disputed. Miller, in fact, acknowledged that "the state did not have a strong case without the testimony of William Davenport." J.A. at 501. Miller reaffirmed this statement during habeas proceedings. If the jury disbelieved Davenport's testimony, they could easily have acquitted Petitioner on both counts, as the remaining evidence required the jury to make considerable inferential leaps in order to connect the gaps in the state's case.

Had the Notes and the evidence of the *nolle prosequied* charges been disclosed by the state, there is a reasonable probability that the jury would have

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[10] The physical evidence in the case consisted of laboratory results indicating that Petitioner could have fired a gun, and bullets of the same type used in the murder found on Petitioner at the time of his arrest. The state lacked the murder weapon, eyewitnesses to the crime, or physical evidence, such as blood, that connected Petitioner to the victims.

returned a verdict of not guilty on both counts. These pieces of evidence, considered cumulatively, would have supplied proof of Davenport's self-interested motive, and a juror considering Davenport's testimony in light of this evidence might well have concluded that Davenport had seized an opportunity to fabricate a story to serve his own purposes. To recount, the Notes demonstrated that Davenport had approached Miller seeking specific benefits. The Notes also indicated that Miller knew what benefits Davenport sought, and that Miller was aware of Davenport's parole eligibility. This evidence would have allowed the jury to infer that Davenport was testifying due to an expectation of lenient treatment, which in turn would have provided the jury with a substantial reason to doubt the veracity of Davenport's testimony. *See Shaffer*, 789 F.2d at 688-89 (finding materiality where the evidence impeached a witness whose credibility was vital to the outcome of the trial); *Reutter*, 888 F.2d at 581-82 (finding a reasonable probability of a different outcome where the jury was not informed of the existence of an impending commutation hearing of a key witness).

The *nolle prosequied* charges were also valuable impeaching evidence. In evaluating this basis for impeaching Davenport's credibility, the relevant question is not whether the disposition of Davenport's charges and his offer to testify were actually linked. Instead, the evidence would have proved valuable if the jury could have found that Davenport believed that these events were connected. The jury here could easily have found that Davenport thought that his offer to testify caused the favorable result he received on his pending criminal charges. Daven-

port would have known that he and Miller discussed his convictions, and that the same prosecuting office had extended Davenport a highly favorable plea arrangement approximately one month later. This evidence would have aided Petitioner's impeachment efforts in two distinct but mutually reinforcing ways. First, Petitioner could have argued that Davenport's receipt of favorable treatment from the prosecution motived Davenport to skew his testimony out of gratitude or a sense of obligation. *See Wisehart*, 408 F.3d at 324 (noting that testimony can be affected by benefits previously bestowed). Second, the receipt of favorable treatment in the past may have amplified Davenport's expectation that a good performance on the witness stand would lead to lenient treatment, providing Davenport with an increased incentive to shape his testimony to benefit the prosecution. The logic is simple: If the prosecution rewarded Davenport for making efforts to cooperate, it stands to reason that further cooperation will lead to additional rewards. This incentive would be especially strong considering that the benefits that Davenport sought had not yet been bestowed.

The majority's first error in considering prejudice stems directly from its failure to consider Davenport's *nolle prosequied* charges suppressed. Because this evidence is not included in the majority's calculus, the majority ignores the fact that Petitioner was deprived of the opportunity to argue that Davenport had already received favorable treatment from the prosecution. This error also affects the overall magnitude of the impeaching evidence, which of course must be considered cumulatively. *See Kyles*, 514 U.S. at 436.

The majority errs again in discrediting the suppression of the Notes because "[t]he jury was apprised of Davenport's status and the possible other reasons for his decision to testify, namely, that he wished to secure early parole as a result of his participation in the Bell case." Majority Op. at 18. Here, the flaw in the majority's reasoning is that it allows *argument* to substitute for *evidence*. Though the jury was aware that Davenport had an upcoming parole hearing, they were provided with no evidence that Davenport's parole hearing was connected to his decision to testify. As it was, Petitioner's claim that Davenport was testifying in order to increase his chances of a favorable result at the parole hearing must have struck the jury as unsubstantiated speculation. Had Petitioner instead proved his claim with reliable evidence provided by the prosecutor himself, there is a reasonable probability that Petitioner's argument would have convinced the jury, which in turn would have discredited Davenport.

Additionally, the majority ignores two other valuable arguments that Petitioner could have advanced had he been in possession of the Notes and the *nolle prosequied* charges. First, as noted above, Miller suggested to the jury that Davenport was motivated to testify by his abhorrence of Petitioner's lack of sorrow and remorse. Armed with the suppressed evidence, Petitioner could have met this suggestion with powerful evidence that Davenport's testimony was opportunistic, not altruistic. Second, Miller misleadingly told the jury that he had no "say-so" with the parole board. By demonstrating that Miller had seen fit to record the date of Davenport's parole eligibility, Petitioner could have mustered some argument that Miller, though lacking formal autho-

ity, might be able to exercise some measure of influence. At the very least, the fact that Davenport knew that his parole hearings were discussed with Miller would have provided a basis for arguing that Davenport thought Miller capable of bestowing such a favor on his behalf.

In sum, the suppressed evidence handicapped Petitioner's efforts to discredit Davenport. Had the evidence been disclosed, there is a reasonable probability that the jury would have doubted Davenport and acquitted Petitioner.

III.

For the foregoing reasons, I respectfully dissent.

DISSENT

KAREN NELSON MOORE, Circuit Judge, dissenting. Although I agree fully with the primary dissenting opinion, I write separately to express my befuddlement regarding the reason for rehearing this case en banc. The text of Federal Rule of Appellate Procedure 35 is clear: "An en banc hearing or rehearing is not favored." Fed. R. App. P. 35(a). Rule 35 limits the reasons for granting rehearing en banc to (1) ensuring "uniformity of the court's decisions," and (2) resolving "a question of exceptional importance." *Id.* The text of our parallel circuit rule is clear as well: "A suggestion for rehearing en banc is an *extraordinary procedure* which is intended to bring to the attention of the entire Court a precedent-setting error of *exceptional public importance* or an opinion which *directly conflicts* with prior Supreme Court or Sixth Circuit precedent." 6 Cir. R. 35(c) (emphasis added). And lest anyone think that a panel's "getting it wrong" qualifies as a matter of exceptional public importance, our Rule notes that "[a]lleged errors . . . in the facts of the case (including sufficient evidence), or errors in the application of correct precedent to the facts of the case, are matters for panel rehearing *but not for rehearing en banc.*" *Id.* (emphasis added).

After reading the panel's decision and the parties' supplemental briefs, I was uncertain why a majority of this court had agreed to rehear this case en banc. Nowhere did either of the parties identify any inconsistency of the panel's decision with prior decisions of this court (or with Supreme Court decisions, for that

matter). Nor did the parties highlight any question of exceptional importance. To the contrary, the briefs reflected a rather pedestrian disagreement regarding whether Petitioner Bell had offered sufficient evidence to establish a tacit agreement.

I had hoped that oral argument would clarify my confusion. Certainly, I thought, either the advocates or my colleagues on the bench would highlight the exceptional importance of this case. I had believed that after oral argument, I would see clearly that this dispute was not just a question of whether record evidence supported the panel majority's opinion, but instead a complicated *legal* question that required fourteen seasoned legal minds to resolve. Suffice it to say, I am disappointed.

The entire debate at oral argument—as in the briefs—centered not on *whether* a petitioner could premise a *Brady* violation on the prosecutor's failure to disclose a tacit agreement. The State's counsel conceded—both in its brief, Appellee's Supp. Br. at 12, and at oral argument—that *Brady* and its progeny support such a rule. Instead, the parties disputed whether Bell's evidence *established* such an agreement. In other words, the State argued that the panel had gotten the facts wrong—that the evidence was insufficient, notwithstanding the panel's opinion. But as noted above, such an argument has no place before the en banc court. *See* 6 Cir. R. 35(c).

We do not convene en banc to exercise plenary review over panel decisions. Yet that is precisely what has happened here because the State has failed to identify either a conflict between the panel decision and binding precedent or a matter of

exceptional public importance that this case raises. Because I believe that Federal Rule of Appellate Procedure 35(a) and Sixth Circuit Rule 35(c) preclude us from reviewing en banc the panel's decision, I would **DISMISS** the petition for rehearing en banc as improvidently granted. I respectfully dissent on that basis. Having failed to convince my colleagues that we should dismiss the petition as improvidently granted, I join the primary dissent on the merits.

DISSENTING IN PART AND CONCURRING IN PART

MARTHA CRAIG DAUGHTREY, Circuit Judge, dissenting in part and concurring in part.

I agree with Judge Moore that rehearing *en banc* was improvidently granted in this case and, for that reason, I would vacate the order granting rehearing and reinstate the panel opinion. The dispositive question in this section 2241 matter boils down to the sufficiency or insufficiency of the evidence presented on the petitioner's behalf in district court and, therefore, fails to meet the requirements of Federal Rule of Appellate Procedure 35(a).

That said, however, because the panel opinion has been vacated by order of a majority of the court, it becomes necessary to redetermine the principal issue raised on appeal. On that score, I would vote in conformity with the majority's analysis of the facts and hold that the evidence fails to establish the existence of a tacit agreement between the state prosecutor, Miller, and the state's witness, Davenport.

APPENDIX C

[Entered Mar. 25, 2005]

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

No. 3:04-0169

ROGER DALE LEWIS,
Petitioner,

v.

STATE OF TENNESSEE,
Respondent.

ORDER

For the reasons stated herein and in the Memorandum entered contemporaneously herewith, the Court rules as follows:

(1) Petitioner's Motion to Enforce Provisions of Rule 8 (Docket Entry No. 24), which seeks leave to file a further response to Respondent's Motion to Dismiss and For Judgment as a Matter of Law, is hereby DENIED. The Court has carefully considered Petitioner's 31-page habeas corpus petition which includes facts and supporting argument, as well as Petitioner's 11-page response to Respondent's Statement of Material Facts, and Petitioner's 14-page Statement of Material Facts. The Court has meticulously reviewed the entire state court record presented in this case, and the Court is

satisfied both parties have received sufficient opportunity to present their positions in accordance with the Rules Governing Section 2254 cases;

(2) the Petition for a Writ of Habeas Corpus under 28 U.S.C. § 2254 (Docket Entry No. 1), is hereby DENIED WITH PREJUDICE; and

(3) because Petitioner can demonstrate that reasonable jurists may find the Court's evaluation of the Brady and prosecutorial misconduct claims, which appears at pages 22 to 35 of the accompanying Memorandum, is debatable or wrong, a Certificate of Appealability shall issue as to those two claims only. See Slack v. McDaniel, 529 U.S. 473, 483-84 (2000); Frazier v. Huffman, 343 F.3d 780, 788 (6th Cir. 2003); Porterfield v. Bell, 258 F.3d 484, 487 (6th Cir. 2001).

IT IS SO ORDERED.

/s/ Robert L. Echols
ROBERT L. ECHOLS
UNITED STATES DISTRICT JUDGE

APPENDIX D

[Entered Mar. 25, 2005]

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

No. 3:04-0169

ROGER DALE LEWIS,
Petitioner,

v.

STATE OF TENNESSEE,
Respondent.

MEMORANDUM

Pending before the Court is the *pro se* Petition for Writ of Habeas Corpus under 28 U.S.C. § 2254 filed by Petitioner Roger Dale Lewis (Docket Entry No. 1), and Respondent State of Tennessee's Motion to Dismiss and For Judgment As a Matter of Law (Docket Entry No. 7). In accordance with the Court's previous Orders, the parties have fully set forth their respective positions on the facts and the law. This timely Petition arises from Petitioner's 1993 jury conviction for arson and his sentence of imprisonment of twenty-one (21) years in the Tennessee Department of Corrections. At the time Petitioner filed the instant petition, he had been released from state custody and was on parole.

I. BACKGROUND

A. Facts of the case and jury trial

In May 1992, Petitioner lived alone in apartment B-14 at the Cheryl Apartments in Hendersonville, Tennessee. The apartment manager, Karen Evans, gave Petitioner notice on May 1 to vacate his apartment by May 15 because he was two months' behind in the payment of rent. Petitioner angrily told Evans that no one was going to force him to move out. On May 3 or May 4, Petitioner started moving his personal property out of the apartment.

By the first of June, however, Petitioner still occupied the apartment. He had arranged for the disconnection of the electricity and was staying with a friend, Alan Coker. On June 3, Petitioner and the apartment owner, Calvin Hyde, had a heated discussion during which Hyde told Petitioner to "get out." A neighbor, Denise Threet, who witnessed the confrontation, asked Petitioner what was going on, and Petitioner replied that a lot was going on and "he would be sure to get back at them."

At approximately 3:15 to 3:20 a.m. on June 5, Evans looked out her front window while feeding her infant and saw Petitioner's car, a gray Buick, leave the apartment complex at high speed. She could not see the driver because of the car's dark, tinted windows. She could easily see the car, however, because of a light in the parking lot.

Meanwhile, Renee Scalf, her husband and two children were asleep in the apartment directly below Petitioner's. At approximately 3:15 a.m., the Scalfs awoke when they heard stomping noises coming from above. Mrs. Scalf beat on the ceiling with a broom. A

few minutes later Mrs. Scalf heard crackling noises and her husband heard a fire alarm. They ran from their apartment to find Petitioner's apartment on fire. Renee Scalf ran to Evans' apartment and reported the fire. Evans called 911 at 3:34 a.m. The Scalfs beat on the doors of the other occupied apartments and helped the other residents, four adults and five children, to safety. Two apartments were unoccupied. Two residents of another apartment, the Mitchells, had left their home at approximately 3:15 a.m. to walk to their jobs at a nearby restaurant. They did not see or hear anything unusual when they left. When they learned of the fire, they ran home and rescued their 32-year old son.

The top floor of the building was fully involved in fire by the time the first engine company arrived at the scene at 3:36 a.m. The Hendersonville Fire Marshal, Royce Hamilton, arrived before the engine company. He could see heavy fire over the second floor at the point of entry to apartment B-14. The fire department brought the blaze under control in 45 minutes. All eight apartments were destroyed by fire, smoke and water damage. The roof was burned away. The residents were able to save very few personal items.

When the fire was out, Hamilton entered apartment B-14 and found a large burn hole in the living room floor and another burn area on the floor just inside the front door. The floor joists in the living room had burned completely in two. He could tell from the burn pattern that the fire started at the topside and burned down. He also noted other areas of charring at floor level and near the front door and window. He did not find an electrical outlet, light socket, or wiring

leading to the area where the fire started. He later learned that the power had been shut off. He could not identify any accidental cause of the fire. Because the fire burned so fast, he believed that an accelerant had been used. He took six samples of charred wood and carpeting from the burned areas. He sent those samples to the state crime lab for analysis.

The forensic scientist could not identify any petroleum distillates in the samples. She explained that the negative result could mean that no accelerant was used, the investigator did not sample in an area that contained an accelerant, or the fire burned with such heat that the accelerant was completely consumed. In four of the samples she identified turpenes, which can be produced by the burning of wood itself.

Petitioner showed up at the apartment complex at approximately 11:00 a.m. on the morning of the fire. He confronted Evans and asked her why she had not called him about the fire. She told him she did not know how to contact him. According to Evans, Petitioner stated to her, "Karen, you know we didn't have no arguments, didn't you[?]"

Hamilton returned to the apartments about 11:30, told Petitioner they needed to talk, and read Petitioner the Miranda rights. Petitioner stated he understood his rights, but he wanted to know what he was charged with. Hamilton told him he was not charged with anything. He allowed Petitioner to call his sister, and Petitioner then agreed to speak to Hamilton.

Petitioner stated he was last at his apartment before dark on June 4 because there was no power in

his unit. He denied that he was in Hendersonville after dark. He stated he had returned to the apartment to finish moving his property.

Hendersonville Police Detective Danny Coarsey arrived at the scene and continued the interview. Petitioner explained that, before the fire, he was with a friend at a lounge, and he stopped at a convenience store ("the Dodge Store") to buy beer just before 3:00 a.m. The apartments are four to five minutes from the Dodge Store. Petitioner stated he returned to the residence where he was staying with Alan Coker on Tyree Springs Road and made telephone calls between 3:00 and 4:00 a.m., to his friends Maureen Bardill and Kim Stevens. The residence where Petitioner was staying is about ten minutes from the apartments.

Petitioner told Detective Coarsey that he lost everything in the fire and compiled a list of his lost property. The list included stereo equipment, an amplifier, turntables, a phonograph, numerous cassette tapes, master recording tapes, and numerous old coins. Hamilton did not find any old coins when he sifted the fire debris. Immediately after speaking to Petitioner, Coarsey interviewed each of the alibi witnesses Petitioner named.

The next day, Coarsey interviewed Petitioner again at the police station for about one hour. Coarsey told Petitioner that his alibi witnesses did not support his story. Both Bardill and Stevens reported that Petitioner called them after 4:00 a.m. on June 5. Coker reported he woke up at approximately 4:00 a.m. when Petitioner arrived at the house. During the interview Petitioner became very emotional. He told Coarsey the evidence was so great that he might as

well plead guilty. Coarsey told Petitioner several times that he did not want him to say he was guilty unless he set the fire and was guilty. Petitioner repeatedly stated that he did not do it, but he wanted to save his parents from embarrassment.

Coarsey asked permission to search Petitioner's 1987 silver Buick. Petitioner agreed and signed a consent form. Coarsey opened the trunk and found a plastic jug without a lid. The jug had a strong odor of gasoline. Petitioner appeared a little shocked that the jug was in the trunk, but he thought a minute and told Coarsey that about four months earlier he had helped a friend who ran out of gas. Laboratory analysis showed that the jug had contained gasoline or gasohol, that without a lid any such substance would have evaporated from the jug completely in seven to ten days, and that it would be highly unlikely that any gasoline substance could have been detected if the jug had last been used three to four months earlier. Coarsey also observed in the trunk a fire jacket, fire pants, and fire boots that Petitioner used in his work as an emergency medical technician. Petitioner had told Coarsey he lost those items in the fire.

After the second interview, several months passed, and Petitioner eventually moved in with his sister. On October 2, 1992, Detective Coarsey and Inspector Hamilton executed a search warrant in the area of the house where Petitioner was staying to look for items Petitioner reportedly had lost in the fire. They found old coins, numerous cassette tapes, master recording tapes, boxed kitchen items, electronics, guitars, personal notes, memorabilia, financial records, and numerous personal effects. They also

discovered a pawn ticket and a receipt showing that a stereo system had been pawned shortly before the fire and that a turntable and receiver had been pawned after the fire. These were items Petitioner claimed were destroyed in the fire.

Petitioner was arrested and taken into custody. He was held in the Sumner County Jail for several days until he made bond.

At the trial held on March 9 & 10, 1993, the jury heard all of the evidence described above. [1] In addition, Maureen Bardill testified for the State that she received a call from Petitioner at her workplace on June 5 after 4:00 a.m. Petitioner told her that he had tried to call her in the previous fifteen minutes, but she knew that he had not done so because she had not received any calls on the outside line. She received a second call from Petitioner later the same day, June 5, in the afternoon. He wanted to know if the police had contacted her. She told him they had. Petitioner wanted to know if she was sure the time of his call was 4:00 or after, and she replied it was. Petitioner talked about the apartment burning, that he had gone there to move his property, and that he had been interviewed by the police and was a suspect in the fire. It struck Bardill as odd that Petitioner mentioned gasoline three or more times.

Kim Stevens testified for the State that she received a call from Petitioner about 4:15 a.m. on June 5 at her workplace. Petitioner essentially made derogatory statements about people they both knew. Petitioner called her again later in the day and left two voice mail messages, both of which were played for the jury.

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[1] The trial was held before the late Honorable Fred A. Kelly III.

The State's key witness was Ernest Bishop, a jail inmate who claimed that Petitioner confessed the crime to him. The State presented Bishop to the jury cleaned up and dressed in street clothes. On direct examination, Bishop stated that he was in jail and waiting for his sentencing heâring later in the month before the same trial judge on charges of theft and filing a false police report. He testified he met Petitioner in jail and overheard Petitioner making statements about the fire. Bishop decided to talk to somebody when he thought about his daughter, who "almost got burned up one time." Bishop sent word that he wanted to see a police officer, and Detective Coarsey interviewed him. Bishop denied that he had any source of information except Petitioner.

At the request of Petitioner's retained trial attorney, Phillip Davidson, the trial court excused the jury and allowed defense counsel to voir dire Bishop to determine if any promises had been made to him in exchange for his testimony because the State had not disclosed any such information in discovery. Bishop spoke up and said, "Nobody has promised me nothing." The following exchange then occurred:

> Q. Sir, you have got a sentence hearing coming up?
> A. Yes, sir.
> Q. In your discussions with Detective Coarsey did he implicate to you in any way if you give him this information that you might get a favorable reaction from law enforcement officers, that they would go to the District Attorney to help you out a little bit?
> A. No, sir. I didn't talk to him about that at all.
> Q. He hasn't ever mentioned anything to you?

A. No, sir.
Q. Anybody else mention anything to you?
A. No sir.

When counsel began to probe in another area, the trial court stopped the voir dire and summoned the jury back to the courtroom. (Docket Entry No. 9, Addendum 2, Trial Tr. at 88.)

Continuing the direct, the prosecutor began with the question, "Mr. Bishop, have you been promised anything up here today in return for your testimony?" Bishop answered, "No, sir." The prosecutor asked, "Are you here to tell the truth here today?" Bishop responded, "Yes, sir." (Id.)

Bishop then testified that Petitioner disclosed to him he was charged with arson, that he had moved some of his property out of the apartment, and that he had disconnected the electricity. When Petitioner went back to the apartment, he poured gasoline from a plastic jug into the ceiling light fixture with the intention that the apartment would catch fire when the next tenant moved in and turned on the electricity. When Petitioner stepped down, he knocked over a big box of tapes. He thought the people downstairs could hear him. In an effort to see his way out, Petitioner flicked his lighter and set the whole place on fire. He got in his car and left. He thought the woman downstairs may have seen him. Petitioner later was stopped by the police, who checked his car and found a gallon jug in the back. Petitioner told Bishop he planned to tell the police he used the jug to help a friend who ran out of gas. Petitioner did not know why he took the jug with him and thought it would have burned if he had left it behind because the fire went up so quickly. Petitioner also told Bishop that

he had moved a lot of his property to his sister's or a friend's house. Bishop denied that he learned these facts from any other source.

On cross-examination, Bishop identified his own mug shot, which was admitted into evidence. He was evasive when asked to name or describe his prior felony convictions, saying "I'm not exactly sure," and "Well, I'm not for sure what." When asked, "Have you ever been in the last 10 years convicted of a felony?" Bishop answered, "Last 10 years, I don't think so. I'm not sure." Bishop acknowledged he was awaiting extradition to Texas on a sexual assault charge. Bishop was unaware that Petitioner's apartment did not have a ceiling light fixture in the living room, but he said Petitioner told him he poured gasoline in the ceiling and Petitioner did not know he had spilled gas when he used his lighter.[2] Counsel asked, "Have you ever worked for the police before in the past, given them information that's helped you out in some of the sentencing, some of the things you don't remember you did?" Bishop replied, "No, sir."

After Bishop appeared, Coarsey explained to the jury how he came to interview Bishop and denied that he gave Bishop any information about the case. Only Coarsey, the Petitioner, and Inspector Hamilton knew that the plastic jug had been found in Petitioner's car. Coarsey testified he talked to Bishop three times and Bishop provided the same information each time. During the first interview, Coarsey took handwritten notes. His lieutenant requested a taped statement, so Coarsey conducted a

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[2] Previously, Evans testified that Petitioner's apartment did not have a ceiling light fixture in the living room, but that there were ceiling light fixtures in the kitchen and the two bedrooms.

second interview with Bishop, taped it, and had the tape transcribed. He provided a copy of the tape and the transcribed statement to the prosecutor. Coarsey was not asked about his third interview with Bishop. When questioned on cross-examination how he thought Petitioner had managed to pour gasoline into a ceiling light fixture, Coarsey testified, "The light fixture comes out with two screws. I assumed that would be simple to do."

Petitioner testified and called five witnesses. Petitioner denied that he set the fire and explained his actions and statements. He stated that, when he was arrested and taken to jail, he possessed a copy of the search warrant and supporting affidavit.[3] When Petitioner left the cell for any reason, he placed his papers on his bunk. He believed that Bishop gained access to the search warrant affidavit and learned the facts he needed to concoct a story to testify against Petitioner.

Jonathan Pooler, another jail inmate, appeared for the defense dressed in jail clothing. He testified that Petitioner told him he was charged with arson and that Petitioner showed him some paperwork he had with him, but he did not recall if it was a search warrant. Pooler read part of the papers. He did not recall that Petitioner ever discussed his case.

During closing argument the prosecutor referred to Bishop as the State's "key witness," repeatedly pointed to his testimony, and stated that Bishop's

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[3] The supporting affidavit set out the State's entire case against Petitioner at that time, including Coarsey's discovery of the plastic jug and the lab result indicating the jug had contained an alcohol-type substance.

testimony had "a very real element of truth and a ring of truth." The prosecutor also argued that Bishop had no reason to make up a story, and stated, "What has he got to gain? There was (sic) no promises made to him." The prosecutor also stated that Detective Coarsey had "[t]aped him one time." (Docket Entry No. 9, Addendum No. 10, Closing Arg. Tr. at 3-4, 7, 8, 13, 18, 20-21, 24.)

The jury convicted Petitioner on all five counts of arson. Petitioner then retained new defense counsel. On April 30, 1993, the trial court sentenced Petitioner to an effective sentence of thirty (30) years of imprisonment.

B. Post-trial procedural history

Petitioner moved for a new trial on six grounds, including that Bishop had testified falsely and that Bishop had received special consideration and treatment by the State in exchange for his testimony. At Bishop's sentencing on March 26, 1993, the trial court imposed a sentence of seven months (time served) with probation to begin immediately. The evidentiary hearing on the motion for new trial focused primarily, however, on Bishop's release from the Sumner County jail following sentencing due to his alleged heart problem, despite the fact that Texas had previously placed a "hold" on him. Bishop subsequently failed to appear in Texas on the charges pending against him there.

In opposition to the new trial motion, the State submitted the affidavit of Bishop's Tennessee counsel, A. Russell Brown, who stated that Bishop pled guilty in Sumner County to a felony and two misdemeanors on January 12, 1993, that Bishop agreed to a

sentencing hearing that was held on March 26, that Bishop testified in the interim against Petitioner, and that "[t]here was no agreement or deal between [Petitioner] and the State of Tennessee with regard to the length or type of sentence he would receive if he testified for the State." (Docket Entry No. 9, Addendum 3, Ex. 4.) The trial court ruled that the evidence before it did not reveal any "deal" made with Bishop in exchange for his testimony against Petitioner and denied the motion for a new trial. (Docket Entry No. 9, Addenda 1 & 4.)

Petitioner then appealed his convictions and sentence to the Tennessee Court of Criminal Appeals claiming that (1) the evidence was insufficient; (2) Bishop received special consideration and treatment in exchange for his testimony; (3) Petitioner was denied due process because an alibi witness, Carol Hoard, the Dodge Store clerk, could not be located at the time of trial; and (4) the trial court erred in imposing consecutive sentences on some of the counts. The Court of Criminal Appeals affirmed the convictions and sentence on January 12, 1995. State v. Lewis, No. 01C01-9404-CR-00135, 1995 WL 10510 (Tenn. Crim. App. Jan. 12, 1995). With regard to the second issue concerning Bishop, the court summarily held that Petitioner's contentions were not supported by fact or legal authority, that Petitioner had not provided any citations to authority in his brief to support his argument, and accordingly, he had waived the issue under Rule 10(b) of the Rules of the Tennessee Court of Criminal Appeals. (Docket Entry No. 9, Addendum 10.)

On February 13, 1996, Petitioner filed a petition for post-conviction relief raising numerous issues of

ineffective assistance of trial counsel and prosecutorial misconduct. Petitioner also apparently filed in the trial court a motion requesting additional time in which to file an application for permission to appeal his convictions and sentence to the Tennessee Supreme Court, which the trial court granted. The Tennessee Supreme Court granted the application, and in 1997 that court reversed four of the five counts on the ground that multiple convictions for aggravated arson arising out of the same fire violated Double Jeopardy principles. The Tennessee Supreme Court remanded the case for re-sentencing on Count One. State v. Lewis, 958 S.W.2d 736, 738-740 (Tenn. 1997).

On remand, the trial court[4] sentenced Petitioner to twenty-one (21) years of imprisonment. The Tennessee Supreme Court affirmed the sentence in May 2001, holding that the trial court properly applied enhancements for "particularly vulnerable" victims, Tenn. Code Ann. § 40-35-114(4), and for multiple victims, Tenn. Code Ann. § 40-35-114(3). State v. Lewis, 44 S.W.3d 501 (Tenn. 2001).

Upon the conclusion of direct appellate review, Petitioner amended the post-conviction petition, through newly-appointed counsel, Thomas Nelson, to add allegations that attorney Pellegrin, who represented Petitioner on the motion for new trial and on direct appeal, rendered ineffective assistance in various ways, including his failure to investigate Ernest Bishop. Following an evidentiary hearing held on March 18, 2002, at which Petitioner and trial

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[4] The Honorable Jane Wheatcraft, who was assigned to the case upon the intervening retirement of Judge Kelly.

counsel Davidson testified, the trial court denied post-conviction relief on August 30, 2002.

Petitioner appealed the denial of post-conviction relief to the Tennessee Court of Criminal Appeals. He raised as issues that the trial court erred in holding that Petitioner's trial counsel was competent, prepared and effective during trial; that Bishop was not a significant part of the State's case, and that the State's failure to provide trial counsel with Bishop's prior criminal history did not violate Brady v. Maryland, 373 U.S. 83 (1963). The Tennessee Court of Criminal Appeals framed the issues as concerning ineffective assistance of trial counsel, violation of Brady, and prosecutorial misconduct, and affirmed the denial of post-conviction relief. Lewis v. State, No. M2002-02439-CCA-RE-PC, 2003 WL 22438526 (Tenn. Crim. App. Oct. 28, 2003). The Petitioner did not seek permission to appeal to the Tennessee Supreme Court. Rather, on March 2, 2004, he timely filed this federal habeas corpus action asserting twenty (20) claims.

The evidence presented at the post-conviction hearing, as well as the state courts' rulings on the post-conviction petition, will be discussed more fully below in analyzing Petitioner's claims.

III. STANDARDS OF REVIEW

Because this federal habeas petition was filed on March 2, 2004, the Court's review is governed by the Antiterrorism and Effective Death Penalty Act of 1996. The Court may not grant the writ of habeas corpus for any claim that was adjudicated on the merits in state court unless that adjudication:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). The state court's findings are presumed to be correct and they can be contravened only if Petitioner can show by clear and convincing evidence that the state court's factual findings were erroneous. 28 U.S.C. § 2254(e)(1).

Section 2254(d) dictates a highly deferential standard for reviewing and evaluating state court rulings, and state court decisions must be given the benefit of the doubt. Bell v. Cone, – U.S. –, 125 S. Ct. 847, 853 (2005) (citing Lindh v. Murphy, 521 U.S. 320, 333 n.7 (1997)). A state court decision is "contrary to" Supreme Court precedent "if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law," or "if the state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to" the Supreme Court. Williams v. Taylor, 529 U.S. 362, 405 (2000). A state court decision is also "contrary to" Supreme Court precedent if the state court "applies a rule that contradicts the governing law set forth" in that precedent. Id. A state court decision involves an "unreasonable application" of clearly established Supreme Court precedent "if the state court identifies the correct governing legal rule from [the Supreme] Court's cases but unreasonably applies it to the facts of the

particular state prisoner's case." Id.. at 407-408. This Court "should ask whether the state court's application of clearly established federal law was objectively unreasonable. Id. at 409. An "unreasonable" application of federal law is different from an "incorrect" application of federal law. Id. at 410. A federal court may not issue the writ "simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." Id. at 411.

To establish ineffective assistance of counsel, Petitioner must show that his trial counsel's performance was deficient and that the deficiency prejudiced him. See Strickland v. Washington, 466 U.S. 668, 687 (1984). Petitioner must show that counsel made errors so serious that he was not functioning as the counsel guaranteed by the Sixth Amendment, and that, "but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 687; Johnson v. Bell, 344 F.3d 567, 572-573 (6th Cir. 2003). A court need not address both parts of the Strickland test if the petitioner makes an insufficient showing on one. Strickland, 466 U.S. at 697.

In assessing counsel's performance, the Court must inquire whether that performance fell below an objective standard of reasonableness, as measured by prevailing professional norms. See Johnson, 344 F.3d at 572. "This objective reasonableness standard encompasses strategic litigation choices that simply fail to bear fruit." Id. at 572-573. The Court must "indulge a 'strong presumption' that counsel's conduct

falls within the wide range of reasonable professional assistance because it is all too easy to conclude that a particular act or omission of counsel was unreasonable in the harsh light of hindsight." Bell v. Cone, 535 U.S. 685, 702 (2002) (quoting Strickland, 466 U.S. at 689). "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Strickland, 466 U.S. at 689.

Petitioner is entitled to an evidentiary hearing only if he alleges sufficient grounds for issuance of the writ, relevant facts are in dispute, and the state courts did not hold a full and fair evidentiary hearing. Sawyer v. Hofbauer, 299 F.3d 605, 610 (6th Cir. 2002).

IV. ANALYSIS

A. Procedurally defaulted claims

The State contends that fifteen of the twenty claims Petitioner raised in his federal habeas petition are procedurally defaulted. The State reasons that, under Tennessee law, Petitioner could file only one petition for post-conviction relief attacking a single judgment, Tenn. Code Ann. § 40-30-102(c), and that Petitioner was required to present all issues he wished to raise in that petition and, if such claims were denied, in an appeal to the Tennessee appellate courts. See O'Sullivan v. Boerckel, 526 U.S. 838, 847-848 (1999); Adams v. Holland, 330 F.3d 398, 401-403 (6th Cir. 2003); Lorraine v. Coyle, 291 F.3d 416, 422 (6th Cir. 2002). Because Petitioner now presents many claims that he did not raise in his appeal to the Tennessee Court of Criminal Appeals,

the State contends such claims are procedurally defaulted. Moreover, Petitioner has not shown cause and prejudice to excuse his procedural default or that a miscarriage of justice will result from enforcing the procedural default. See Coleman v. Thompson, 501 U.S. 722, 750 (1991); Lorraine, 291 F.3d at 422.

The Court agrees that Petitioner did not present to the Tennessee Court of Criminal Appeals eleven of the fifteen claims identified by the State. Those defaulted claims[5] include the State's failure to (4) disclose to Petitioner that the State contacted other jurisdictions and arranged Bishop's release in exchange for his testimony against Petitioner, and (5) & (6) that the State knowingly and willingly allowed multiple, factual inaccuracies to be presented during Petitioner's trial and made no attempt to correct them, fully aware that Petitioner would have no remedy to correct the record after trial. Also defaulted is the claim that the trial court failed to (7) correct the State's inappropriate actions and failed to allow Petitioner any latitude in showing why the State's actions merited review.

Also defaulted are claims of ineffective assistance, including trial counsel's failure to: (13) obtain three audiotapes in the possession of the police which would have shown the State and the police "cut a deal" with Bishop in exchange for his testimony; (14) correct multiple inaccuracies presented as facts during trial, thus waiving Petitioner's opportunity to correct those inaccuracies in other reviewing courts; (16) investigate Calvin Hyde's serious financial problems at the time the fire occurred; (17) question and/or subpoena

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[5] For ease of reference, the Court will identify the claims using the same number given to them in the federal habeas petition.

Hyde when there was evidence that Hyde had ample motive to set the fire and stood to gain from insurance settlements if someone else was convicted of arson; (18) investigate the Hendersonville Fire Department's critical error in its first response, which resulted in an unreasonable delay in firefighting efforts; (19) challenge the multiple discrepancies in Hamilton's testimony about the fire's origin; and (20) challenge the State's continuous use of falsities during trial. Because Petitioner has not attempted to show cause and prejudice for his default and because enforcement of the default will not result in a miscarriage of justice, these claims are barred.

While it does not appear that Petitioner explicitly raised in his post-conviction appeal the other four claims the State identifies as procedurally defaulted, the Court concludes that a careful reading of the Tennessee Court of Criminal Appeals' opinion, Lewis v. State, 2003 WL 22438526, establishes that the court considered the four claims when it discussed ineffective assistance of trial counsel, the Brady claim, and prosecutorial misconduct. Because the Tennessee appellate court addressed these claims, this Court will address them also.

Thus, the nine claims remaining for determination include the State's failure to (1) correct Bishop's false testimony; (2) disclose to Petitioner that Bishop had an extensive criminal record and that Bishop worked with police and the prosecution in other cases prior to Petitioner's trial; and (3) disclose to Petitioner that Bishop received "time served" in exchange for his testimony against Petitioner, despite the placement of a hold on him by another jurisdiction. Like the Tennessee Court of Criminal Appeals, the Court will

consider the first issue as a claim of prosecutorial misconduct, and the next two issues as one Brady claim.

Also remaining for analysis are claims that Petitioner was denied the effective assistance of trial counsel because attorney Davidson failed to (8) investigate Bishop's criminal background; (9) obtain an NCIC report on Bishop which would have shown his lengthy criminal history; (10) investigate Bishop's history of working for the police and prosecution; (11) examine files in the office of the Sumner County Clerk that would have revealed Bishop was a seasoned "snitch" and was well known as such in Sumner County; (12) obtain copies of the pleadings requesting that Bishop's sentencing hearing be delayed until after Bishop testified at Petitioner's trial; and (15) locate and question Carol Hoard, the Dodge Store clerk, who would have established Petitioner's whereabouts at the time of the fire. For expediency, the Court will compress the first five issues into one claim of ineffective assistance in the cross-examination of Bishop and one claim of failure to locate Carol Hoard.

B. Merits of the claims

1. The Brady claim

The grand jury returned an indictment against Petitioner on November 5, 1992. The State's witnesses were listed on the indictment. The name, Ernest Bishop, appeared on the list. (Docket Entry No. 9, Addendum 1 at 4.)

On December 23, 1992, Petitioner's trial counsel, Davidson, filed a broad Motion for Discovery specifically requesting any discovery that was excul-

patory, that tended to reduce the degree of the offense or punishment, or that could be used to impeach the credibility of any government witness, citing Brady and United States v. Agurs, 427 U.S. 97 (1976). The motion also requested, among other things, discovery of the nature and substance of any agreement, immunity promise, or understanding between the State and any of its witnesses relating to the expected testimony of the witness, citing Giglio v. United States, 450 U.S. 150 (1972). In the same vein, the motion also asked for discovery of the nature and substance of any preferential treatment given at any time by the State to a witness and a copy of the witness's criminal record ("NCIC") and prior statements. (Docket Entry No. 9, Addendum 10.)

On January 13, 1993, Wayne Hyatt, Assistant District Attorney, responded to the discovery motion and disclosed Petitioner's statements to law enforcement, the physical evidence which included tape recordings, crime lab reports, Petitioner's NCIC and the names of additional witnesses. The response stated "[t]here is no exculpatory or mitigating evidence known to the State at this time." (Id.)

On January 6, 1992, however, Hyatt, Bishop and his attorney, Russell Brown, entered into a plea agreement providing that Bishop would plead guilty to theft over $1,000, filing a false police report and failure to appear. On the State's motion, another count would be dropped if a van was returned. The plea agreement indicated that Bishop would face a sentence of four years at 30% on Count 2 and 11 months, 29 days at 75% on Counts 3 and 4, to run concurrently, with the trial court to decide the actual sentence. The agreement provided, "State will ask for

defendant to serve 8 months." (Id.) Bishop entered his guilty plea before Judge Kelly on January 12. Sentencing was set for February 26.

On February 22, Bishop's attorney filed a motion to continue the sentencing hearing on the ground that Bishop was scheduled to testify at Petitioner's trial on March 9. The motion stated: "Your movant avers that his cooperation and truthful testimony at this trial should be a factor to be considered by the Court at his sentencing hearing." The motion further stated that the District Attorney General's office was "in agreement with the continuance of the sentencing hearing until after [Bishop] testified[.]" An Agreed Order Continuing Sentencing Hearing, signed by the prosecutor and defense attorney, was presented to the court, which granted the motion and set sentencing for March 26.

At the post-conviction hearing, Davidson testified that he was not aware that there had been a motion to continue Bishop's sentencing. When shown copies of Bishop's plea and sentencing documents, Davidson stated he may have seen them, but he did not recall them, and the documents did not indicate consideration for Bishop's testimony. He did not investigate Bishop's background and did not know that Bishop had testified as a government witness previously. He based his cross-examination on whatever the State had sent him, but he could not recall what those documents were. On the morning of trial, the State made available to Davidson the tape recording and transcript of Detective Coarsey's second interview with Bishop, so Davidson knew what Bishop was going to say before he took the stand. Davidson

testified there was nothing on the tape that he could use in Petitioner's favor.

Davidson stated he tried to impeach Bishop the best that he could based upon the information he was given and that he did not believe Bishop's testimony was credible. The State did not give him a copy of Bishop's NCIC, and Davidson did not obtain one. He did not obtain the NCIC because he felt he "could discredit the testimony enough for the jury." He conceded that Bishop's NCIC would have been helpful in cross-examination because Bishop was evasive when Davidson asked him about his prior convictions. He also believed that he must have had a copy of Bishop's Sumner County file because he had Bishop's mug shot and introduced it into evidence. Davidson called Pooler, the other jail inmate, to testify that Bishop could not have heard the statements he testified about and that Bishop could have learned the information from Petitioner's copy of the search warrant affidavit. In Davidson's view, the jury did not believe a thing Bishop said, but rather thought Bishop was there as a sell-out. Bishop would not answer questions and it looked like the State had cleaned him up for the case. Davidson showed the jury Bishop's photo over the State's objection, and he thought he adequately impeached Bishop.

What concerned Davidson about the case was the eyewitness who saw Petitioner's car leave the apartment complex about the time the fire broke out and Petitioner's inability to account for his whereabouts between 3:15 and 3:35 a.m. Because the State stipulated that Petitioner was at the Dodge Store at 3:00 a.m., counsel stressed to the jury that Petitioner did not have time to commit the crime and that the

fire could not have been started in the way Bishop described. (Docket Entry No. 9, Addendum 10, Hr'g Tr. at 85-95, 113, 115, 123-124, 127, 130.)

The trial court rejected Petitioner's argument that the State's failure to turn over Bishop's NCIC was a Brady violation. The court reasoned that the State had direct and circumstantial evidence against Petitioner and "Ernest Bishop was not a significant part of the State's case" and he "played a minor role[.]" The court also rejected the notion that Bishop received any benefit in sentencing because of his testimony. (Addendum 10, Memorandum Opinion and Order at 6.)

In addressing Petitioner's claims on appeal that the State failed to disclose Bishop's NCIC and his reputation as a "jail house snitch," the Tennessee Court of Criminal Appeals thoroughly discussed Brady and its progeny. Lewis, 2003 WL 22438526 at *7-9. It noted that the trial court implicitly found the first two elements of a Brady violation were met: the information was requested and the State suppressed the information. Although the trial court did not comment on the third element, the appellate court found that the suppressed evidence was "imbued with impeachment value," thus, it was evidence favorable to Petitioner, citing Brady and United States v. Bagley, 473 U.S. 667, 682 (1985). Id. at *7.

Resolution of the issue was thus reduced to the materiality element, which the trial court failed to address. Discussing at length Kyles v. Whitley, 514 U.S. 419 (1995), the appellate court observed that (1) materiality does not demand a showing by a preponderance that the suppressed evidence would have resulted in acquittal; (2) materiality is not a suf-

ficiency of the evidence test; (3) once constitutional error has been found, there is no need for further harmless-error review; and (4) suppressed evidence is to be considered collectively, not item by item, to gauge materiality. Lewis, 2003 WL 22438526 at *8. "Plainly stated, establishing materiality requires a 'showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'" Id. (quoting Kyles).

The appellate court concluded that Petitioner "fails to enlighten us how further impeachment of Bishop would have put the whole case in such a different light as to undermine confidence in the jury's verdict." Id. The court disagreed with the trial court that Bishop was not a significant part of the State's case, but it also was "not convinced that Bishop's testimony was essential to the State's case." Id. The court observed that, even without Bishop's testimony, the State had a strong case against Petitioner and reviewed all of the evidence against him. Id. Further, the court reviewed Bishop's testimony and Davidson's attempts to impeach him. Id. at *9. The court ultimately rejected the Brady claim, concluding that, "[based upon the strength of the state's case and Bishop's evident mendacity, confidence in the jury's verdict is not undermined." Id.

This Court is concerned that the state appellate court's analysis of the materiality component of the Brady claim skates perilously close to a sufficiency of the evidence test, which that court itself recognized is not a proper analysis of materiality under Kyles, 514 U.S. at 434-435. As such, the state court decision may involve an unreasonable application of clearly estab-

lished Supreme Court precedent because the state court identified the correct governing legal rule from the Supreme Court's cases, but may have unreasonably applied it to the facts of Petitioner's case. Williams, 529 U.S. at 407-408.

In Kyles, the Supreme Court cautioned that a "defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict." Id. at 434. The state appellate court engaged in such an analysis when it stressed the strength of the State's evidence against Petitioner even putting Bishop's testimony to one side. The proper standard is found in Kyles, 514 U.S. at 434 (emphasis added):

> Bagley's touchstone of materiality is a "reasonable probability" of a different result, and the adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, *but whether in its absence he received a fair trial*, understood as a trial resulting in a verdict worthy of confidence. A "reasonable probability" of a different result is accordingly shown when the government's evidentiary suppression "undermines confidence in the outcome of the trial." Bagley, 473 U.S. at 678.

See also Sawyer, 299 F.3d at 611.

Even though Kyles had not been decided when this case was tried, Bagley had been, and under Bagley the State's prosecutor bore the "responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of 'reasonable probability' [was] reached." Kyles, 514 U.S. at 437;

Spirko v. Mitchell, 368 F.3d 603, 609-610 (6th Cir. 2004). The State argued in closing that Bishop was its "key witness." See id. at 444 ("The likely damage is best understood by taking the word of the prosecutor, who contended during closing arguments that [certain witnesses] were the State's two best witnesses."). Thus, where the State itself labeled Bishop as its "key witness," it is beside the point whether the post-conviction court or the Tennessee Court of Criminal Appeals could agree whether Bishop was a significant part of the State's case. The State itself said that he was.

Applying the proper standard from Bagley and Kyles, however, the Court concludes that Petitioner received a fair trial resulting in a verdict worthy of confidence even though the State failed to disclose evidence that Petitioner could have used to impeach Bishop further. The Court believes this is the point the Tennessee Court of Criminal Appeals tried to make when it discussed Bishop's evasive answers and referred to his "mendacity." The appellate court stated that "confidence in the jury's verdict is not undermined[,]" Lewis, 2003 WL 22438526 at *9, because Bishop was impeached in cross-examination. As that court remarked, "[s]imply stated, it is highly unlikely that the petitioner's jury was favorably impressed with Bishop's honesty or reliability." Id.

For these reasons, the Tennessee Court of Criminal Appeals correctly held, ultimately, that the evidence the State failed to disclose was not material as that term is understood in Brady analysis. See Sawyer, 299 F.3d at 614 (noting state court's initial treatment of Brady issue was not fatal to its reasonableness under clearly established Supreme Court law where

remainder of court's discussion reasonably applied Brady). This Court must give deference to such a state ruling. See Bell, 125 S. Ct. at 853. While this Court "might have held that the withheld evidence was material if [it] were in the state judges' shoes," this Court is "not writing on a clean slate in deciding this issue." Sawyer, 299 F.3d at 614. "Because the state court's necessary holding that the withheld evidence was not material is not contrary to, nor an unreasonable application of, Brady, and because it is not based on an unreasonable determination of the facts," this Court must deny the writ on the Brady claim. See id.

2. Prosecutorial misconduct

This claim centers on Petitioner's assertion that Bishop testified falsely and that the State failed in its duty to correct promptly Bishop's perjured testimony. Petitioner's trial counsel asked Bishop: "Have you ever worked for the police before in the past, given them information that's helped you out in some of the sentencing, some of the things you don't remember you did?" Bishop responded, "No sir."

At the post-conviction hearing, Petitioner testified that after his trial, he returned to the Sumner County jail where he learned from other inmates and Sheriff's Department employees that Bishop was a jailhouse snitch who had testified in other inmates' cases and that Bishop's repeated use as a State's witness had become a joke. Petitioner stated one deputy said, "we'll have to build another jail to find a room to put him" because Bishop had testified against so many inmates he had to be moved from cell to cell.

Petitioner began investigating Bishop. He learned that Bishop testified against Joe Ivory Johnson in federal court, and introduced at the post-conviction hearing a copy of United States v. Johnson, 16 F.3d 1222 (6th Cir. 1994) (unpublished). (Docket Entry No. 9, Addendum 10, Hr'g Tr. at 37-38 & Ex. 9.) The opinion does not give the specifics of Bishop's testimony in that case. It appears the trial may have taken place in 1993, before Petitioner's. The Sixth Circuit ruled that the prosecutor did not vouch for Bishop's credibility in closing argument and that a mistrial was not warranted when Bishop related that Johnson had threatened his life. Although Petitioner testified at his post-conviction hearing that he believed "[a]rrangements were made between the Sumner County Jail and the federal courts" and "Bishop became a paid informant for the Metro government" the Sixth Circuit's opinion did not address those matters.

Petitioner also testified he learned that in 1989 or 1990, Bishop had testified against James Vaughn from Gallatin, who was convicted, and Bishop was given leniency on his sentence. Petitioner stated that while he was in the penitentiary, he learned of "other things Bishop had done in Metro and other places[.]" (Id. Hr'g Tr. at 39-40.) Petitioner further testified that years later he saw Bishop's NCIC report, which contained numerous prior convictions, aliases, different Social Security numbers and dates of birth and "[t]hat is where I began to realize that Bishop had testified all over the country and been arrested all over the country[.]" (Id. at 41.)

In denying post-conviction relief, the trial court treated Petitioner's claim only as one for ineffective

assistance of counsel in failing to challenge Bishop's credibility and rejected the claim. (Id., Addendum 9, Memorandum Opinion and Order at 4-5.) On appeal, the Tennessee Court of Criminal Appeals addressed the claim as one for prosecutorial misconduct. Lewis, 2003 WL 22438526 at *9-13. The court recognized well-settled law that the State may not present false testimony and that the State bears an affirmative duty to correct false testimony presented by one of its witnesses, citing State v. Spurlock, 874 S.W.2d 602, 617 (Tenn. Crim. App. 1993).[6] To obtain a new trial, however, the court noted that Petitioner was required to demonstrate the State presented false testimony, the State knew the testimony was false, and the testimony was material. Lewis., 2003 WL 22438526 at *9. The test of materiality in this context is whether there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." Id. (citing Giglio, 405 U.S. at 154).

The appellate court observed that the question trial counsel asked of Bishop on cross-examination was directed at two different issues: (1) Bishop's past "working" relationship with the police, not involving testimony as a witness, and (2) Bishop's testimony at Petitioner's trial. Id. The court stated it could find no

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[6] In Spurlock, decided two months after Petitioner's trial, the Tennessee Court of Criminal Appeals reversed a defendant's jury conviction for first-degree murder on the ground that the Sumner County District Attorney General and his assistants knowingly failed to disclose extensive exculpatory and impeachment evidence to the accused under Brady and Giglio, and knowingly failed to correct the false testimony of the State's key witness, a jail inmate who provided information to Hendersonville Detective Coarsey in exchange for the prosecutor's assistance in obtaining his immediate release from jail.

evidence in the record that Bishop had worked with law enforcement prior to Petitioner's trial or that Bishop received some sentencing consideration. Id. at 10. The court did not find any indication in the Johnson opinion that Bishop had received any consideration for his testimony in that case. The court also reviewed Bishop's NCIC report and found, contrary to Petitioner's testimony, that the report did not contain any information about any "deals" or preferential treatment Bishop may have received from law enforcement in the past. Id.

Whether Bishop was promised or received any consideration for testifying against Petitioner was more complicated, the court said. The court reviewed the hearing Judge Kelly held on the new trial motion and the affidavits submitted at that time, which had re-surfaced as post-conviction exhibits before Judge Wheatcraft. Id. at *10-11. The court also considered the certified copies of Bishop's plea agreement, motion to continue sentencing, agreed order continuing the sentencing, and the judgments of conviction. Id. at *11. The court further noted that Petitioner introduced into evidence, without objection or authentication, a videotape of Bishop's purported trial testimony in 1998 as a prosecution witness in a Kentucky homicide case. The court indicated it had watched the tape and defense counsel cross-examined Bishop at length about his prior convictions, aliases and testimony in other cases. Bishop admitted he testified at Petitioner's trial, but hesitated when asked if the testimony was part of a "deal." He responded that "they helped me get probation." Bishop adamantly testified that he did not make a deal before he testified against Petitioner; rather, he was

"hoping" he would "get something" in return for his testimony.[7] Id.

In light of this evidence, the Tennessee Court of Criminal Appeals first ruled that the claim had been "previously determined" on the motion for new trial and on direct appeal such that post-conviction review was inappropriate under Tenn. Code Ann. § 40-30-206(f) (1997), and that the post-conviction proceeding could not be used to re-litigate the question. See Tenn. Code Ann. § 40-30-206(h) (1997). Id. at *12.

Such a ruling constitutes an independent and adequate state procedural ground which ordinarily would bar federal habeas review absent a showing of cause and prejudice or a fundamental miscarriage of justice. See Holland v. Jackson, – U.S. –, 124 S. Ct. 2736, 2737 (2004); Richey v. Mitchell, 395 F.3d 660, 678 (6th Cir. 2005). The ground is independent, however, " 'only if the state court rendering judgment in the case clearly and expressly stated that its judgment rested on a procedural bar.' " Richey, 395 F.3d at 678 (quoted case omitted). A lapsed claim survives if the state court overlooked the default and decided the claim anyway. Id. See also Hill v. Mitchell, – F.3d –, 2005 WL 525231 at *9-10 (6th Cir. March 8, 2005). The Tennessee Court of Criminal Appeals went on to consider the merits of the claim and did not solely rely on the independent and adequate state procedural bar.

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[7] The Court reviewed Bishop's testimony given in the Kentucky case. The defense attorney cross-examined Bishop on his use of numerous aliases and Social Security numbers and Bishop's prior testimony in other cases. Bishop admitted that he hoped to get something for testifying in Petitioner's case and, in fact, he received probation after pleading guilty to a felony charge.

The court rejected the claim on the merits because Petitioner failed to provide the requisite clear and convincing evidence to support the claim as required by Tenn. Code Ann. § 40-30-210(f) (1997). Petitioner failed to demonstrate that Bishop perjured himself when he denied having been promised anything in exchange for his testimony. In that court's view, Bishop moved for a continuance of sentencing, hoped to get something in return for his testimony, and promoted his cooperation and truthful testimony as positive factors he wanted his sentencing court to consider. Petitioner's failure to show Bishop perjured himself also disposed of any due process claim that the State sanctioned perjury. Id. at *12-13.

This Court must give deference to the state appellate court's rulings. See Bell, 125 S. Ct. at 853. Petitioner has not shown that the state court's rulings resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. 28 U.S.C. § 2254(d); Williams, 529 U.S. at 405. Nor has Petitioner shown that the state court decision is contrary to Supreme Court precedent because the state court arrived at a conclusion opposite to that reached by the Supreme Court on a question of law. See id. Consequently, this claim shall be DENIED.

3. Ineffective assistance in cross-examination of Bishop

Petitioner faults trial counsel for his failures to investigate Bishop's background and history of working for the police, to obtain Bishop's NCIC report, and to investigate and obtain copies of pleadings from Bishop's Sumner County file. The post-conviction trial court read the trial transcript, examined the

testimony of Petitioner and Davidson, and reviewed the exhibits presented at the post-conviction hearing. The court found, based on all of the evidence, that trial counsel was prepared for the trial, he filed appropriate pre-trial motions, he gave timely notice of an alibi defense, he interviewed all of the witnesses he could find, and he made proper objections at trial. (Addendum 10, Memorandum Opinion and Order at 3, 5.) The court applied Strickland and determined that Petitioner had not demonstrated that he received constitutionally ineffective representation.

On appeal, the Tennessee Court of Criminal Appeals reviewed the trial court's analysis and ruled that "[n]one of the petitioner's rather cursory arguments convinces us that we should reverse the post-conviction court's dismissal of his petition." Lewis, 2003 WL 22438526 at *6. Petitioner's timeline defense was presented to the jury, and Petitioner did not argue that a different defense theory should have been pursued. Id.

Again, the Court is required to give deference to the state courts' rulings, see Bell, 125 S. Ct. at 853, particularly when, in those courts, the Petitioner attacked his trial counsel's performance on numerous grounds and did not focus solely on counsel's failure to cross-examine Bishop as vigorously as Petitioner later learned counsel might have done.

The effectiveness of trial counsel is to be gauged by what counsel knew at the time and in light of the circumstances then present, not by whether additional information gathered in hindsight indicates counsel should have taken different steps or chosen a different strategy. See Bell, 535 U.S. at 702. The indictment disclosed that Bishop would be a

State's witness. Counsel filed a broad motion for discovery and requested impeachment material. Counsel either received from the State or obtained on his own from Bishop's Sumner County file the mug shot that counsel introduced into evidence. Counsel listened to Detective Coarsey's tape recording of Bishop's second interview and prepared for Bishop's expected testimony.

Counsel knew some details of the scheduling of Bishop's delayed sentencing, because counsel asked Bishop about it on cross-examination. Counsel admitted that he did not investigate Bishop's background as a jail house snitch, but Petitioner produced no evidence in the state proceedings that his counsel would have had any reason to suspect Bishop had testified previously, and counsel testified he had no such knowledge. Petitioner himself did not know anything about Bishop until after he was convicted.

Counsel testified that the pleadings in Bishop's case did not reveal any deal the State made with Bishop, and the state courts so held. Nonetheless, counsel questioned Bishop about whether the State had promised him anything and asked about his prior convictions. While counsel conceded an NCIC report would have helped him in challenging Bishop's credibility, this failure does not amount to ineffective assistance where the trial record shows, trial counsel testified, and the state courts ruled that Bishop evaded questions on cross-examination and appeared to be dishonest and unreliable. Some speculation would be involved to say that additional impeachment of Bishop would have had any further effect on the jury's assessment of his credibility.

Therefore, Petitioner has not shown that the state court's rulings resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. 28 U.S.C. § 2254(d); Williams, 529 U.S. at 405. Nor has Petitioner shown that the state court decision is contrary to Supreme Court precedent because the state court arrived at a conclusion opposite to that reached by the Supreme Court on a question of law. See id. Consequently, this claim shall be DENIED.

4. Ineffective assistance in failing to locate Carol Hoard

Counsel testified at the post-conviction hearing that Petitioner wanted him to talk to Carol Hoard, the Dodge Store clerk, and counsel called the Dodge Store, but he could not locate Hoard. (Addendum 10, Hr'g Tr. at 99.) The inability to locate the witness became less important when the State stipulated that Petitioner was in the Dodge Store at 2:59 or 3:00 a.m. on June 5. (Id. at 100.) Although counsel could not prove, without Hoard's testimony, how long Petitioner stayed at the Dodge Store, the State had an eyewitness who stated she saw Petitioner leave the apartment complex at high speed around 3:15 a.m. Based on what Petitioner told him, counsel filed a notice of alibi stating that Petitioner was talking on the telephone to Kim Stevens at 3:30 a.m. Thus, unable to locate Hoard, counsel focused on other testimony and argument that tended to show Petitioner did not have time to get to the apartment, commit the crime and leave as suggested by the State's proof. Unfortunately, Stevens did not support Petitioner's alibi. (Id. at 100-102.) Based on this testimony and

other evidence, the state courts denied Petitioner's claim of ineffective assistance in failing to locate Hoard.

Petitioner has not shown that the state courts' rulings resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. 28 U.S.C. § 2254(d); Williams, 529 U.S. at 405. Nor has Petitioner shown that the state court decision is contrary to Supreme Court precedent because the state court arrived at a conclusion opposite to that reached by the Supreme Court on a question of law. See id. This claim shall also be DENIED.

V. CONCLUSION

For all of the reasons stated, Petitioner has failed to set forth any ground which would justify this Court in granting the writ of habeas corpus. Petitioner also is not entitled to an evidentiary hearing. Accordingly, the habeas petition shall be DENIED WITH PREJUDICE.

Because Petitioner can demonstrate that reasonable jurists may find the Court's evaluation of Petitioner's Brady and prosecutorial misconduct claims is debatable or wrong, as discussed at length in this Memorandum, a Certificate of Appealability shall issue as to those two claims only. See Slack v. McDaniel, 529 U.S. 473, 483-84 (2000); Frazier v. Huffman, 343 F.3d 780, 788 (6th Cir. 2003); Porterfield v. Bell, 258 F.3d 484, 487 (6th Cir. 2001).

An appropriate ORDER shall be entered.

/s/ Robert L. Echols
ROBERT L. ECHOLS
UNITED STATES DISTRICT JUDGE

APPENDIX E

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

June 2, 2008

Mr. Christopher T. Handman
Hogan & Hartson, L.L.P.
555 Thirteenth Street, N.W.
Washington, DC 20004

Re: Roger Dale Lewis v. Tennessee
Application No. 07A946

Dear Mr. Handman:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Stevens, who on June 2, 2008 extended the time to and including July 28, 2008.

This letter has been sent to those designated on the attached notification list.

Sincerely,

William K. Suter, Clerk

by /s/ Gail Johnson

Gail Johnson
Case Analyst

FILED
SEP 23 2008

No. 08-119

In The
Supreme Court of the United States

ROGER DALE LEWIS,

Petitioner,

v.

STATE OF TENNESSEE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether evidence has been "suppressed" under *Brady v. Maryland*[1] where the evidence the government has been charged with failing to disclose was available in a public record that the defendant had every reason to review.

[1] 373 U.S. 83 (1963).

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OPINION BELOW

The March 14, 2008, opinion of the United States Court of Appeals for the Sixth Circuit, which affirmed the district court judgment denying habeas relief, is unreported. (Pet.App. 1a) The order and memorandum opinion of the district court denying the petition for a writ of habeas corpus are unreported. (Pet.App. 69a, 71a)

STATEMENT OF JURISDICTION

The judgment and opinion of the Court of Appeals were entered on March 14, 2008. (Pet.App. 1a) By order entered on June 2, 2008, Justice Stevens extended the time for filing a petition for writ of certiorari until July 28, 2008. (Pet.App. 110a) Petitioner filed a certiorari petition on July 28, 2008. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

The petitioner was convicted in 1993 of five counts of arson and was sentenced to an effective term of thirty years. On direct review, the Tennessee Supreme Court held that the five acts of arson constituted a single offense and remanded the case for resentencing based upon a single count of arson. On remand, the petitioner was sentenced to twenty-one years. The opinion of the Tennessee Court of Criminal

Appeals on the petitioner's direct appeal summarizes the evidence presented at trial:

> In May 1992, appellant Lewis was asked to move out of his apartment because he had not paid the rent. He threatened retaliation against the landlord. On June 5, 1992, the Cheryl Apartments, located in Hendersonville, Tennessee, burned in an arson fire.
>
> Lewis had been in his apartment on June 4, 1992, in the process of moving items out of the dwelling. On June 5, at about 3:00 a.m., Lewis was in the vicinity of the apartment. At about 3:15 a.m. the residents of the apartment directly below Lewis' apartment heard "stomping noises" emanating from upstairs. Shortly after that, one of the residents saw Lewis' car being driven away from the apartment complex. The fire alarm sounded and the fire department arrived at the complex at 3:36 a.m. Although all of the tenants were evacuated safely, there was extensive damage, and the entire top of the Cheryl Apartments was engulfed in flames. Five apartments were destroyed.
>
> The evidence showed that Lewis returned to his new residence at about 4:00 a.m. on June 5, 1992, and made two telephone calls to two different nurses who apparently were working late on their shifts. One of the nurses thought that it was odd that Lewis mentioned gasoline several times during the conversation.

After an investigation, the fire marshal determined that an accelerant was used to start the fire. The fire began in the living room of Lewis' apartment in the floor area. The electricity had been disconnected in the apartment, and there was no wiring in the area where the fire started. The fire was not an accident, but the investigators could not positively determine the type of accelerant that was used.

During the investigation which lasted for several months, Lewis was interviewed and reinterviewed by the fire marshal or other authorities. Lewis made several inconsistent statements about where he had been on the night in question. Some of his alibi witnesses, particularly the nurses, did not corroborate his time frame of reference so as to eliminate him as a suspect. Lewis claimed that he had lost many items in the fire in his apartment when in fact he had not. In October 1992, authorities searched Lewis' new residence and discovered many items such as coins, cookware, and electronic equipment which he had claimed were lost in the fire. Additionally, a plastic jug was seized from Lewis' car during the investigation. A forensic scientist tested the jug and concluded that it had contained gasoline.

One of the prosecution's witnesses, Ernest Bishop, testified that he was in the Sumner County Jail and was Lewis' cell mate. Bishop testified that he heard Lewis say that he had moved some of his possessions out of his

> apartment, picked up a gallon jug of gasoline, poured gasoline in the ceiling, and then lit his lighter which started the fire. According to the prosecution's theory, however, Lewis had planned to leave the gasoline in the ceiling so that when the electricity was reconnected, a fire would start when someone turned on the lights. Apparently Lewis made a stupid, and potentially deadly, mistake. When he flicked his lighter so that he could see the way out of the apartment, the gas that he had spilled on the floor caught fire.
>
> A detective interviewed Lewis and pointed out that the time frames for his alibi did not coincide. During one of the conversations, according to the detective, "the defendant became very emotional to the point of crying and told me that the evidence was so great that he might as well plead guilty." Apparently Lewis repeated this to the detective several times during the course of the interview.
>
> . . . At his sentencing hearing, the evidence showed that several people, including small children, were sleeping in the apartments when Lewis started the fire. Many people lost all they had in the flames.

State v. Roger Lewis, 1995 WL 10510 (Tenn. Crim. App. Jan. 12, 1995) (app. granted Nov. 12, 1996).

Prior to trial, the petitioner's counsel submitted a discovery request for

> any and all evidence in possession of the State or in possession of any governmental agency that might be termed favorable, whether the evidence be entirely exculpatory in nature or tending to reduce the degree of the offense or punishment, or whether the evidence might be favorably used by the defendant to impeach the credibility of any witness the government intends to call in this matter.

The request then specified certain types of material that should be included under the request, such as agreements between witnesses and the government regarding testimony related to the proceedings against the petitioner, evidence of any preferential treatment or benefit given to a witness in return for the testimony, prior statements of witnesses, names of witnesses who might be favorable to the petitioner, and information regarding the mental condition of any witness that might raise a question regarding the credibility of that witness. (C.A.J.App. 266-268)

At trial, Ernest Bishop testified that the petitioner had divulged to him particular details of his setting his apartment afire. During cross-examination, petitioner's counsel attacked Bishop's credibility by asking, "Mr. Bishop, how many other times have you been convicted of a felony?" and "Well, why don't you tell the jury some of the convictions that you have had for felonies and tell us a few things you've done?" He also asked, "Are you presently waiting to be extradited to Texas?" to which Bishop responded affirmatively. When counsel asked what

charge the extradition was for, Bishop responded that it was for a charge of sexual assault. (C.A.J.App. 94-95)

After the conclusion of petitioner's direct appeal, he sought post-conviction relief and first raised his claim that the State had a duty to divulge the report of his criminal history under *Brady v. Maryland*, 373 U.S. 83 (1963). During the hearing on the petition for post-conviction relief, the petitioner's trial attorney testified regarding his attempts to impeach Bishop during cross-examination. He acknowledged that he did not investigate the background of Bishop and that he made no attempt to obtain Bishop's criminal history through the National Crime Information Center (NCIC). He testified that he "could have gotten an NCIC report," but he chose not to do so. (C.A.J.App. 145-146) He explained:

> A. After looking at and listening to what he said and looking like he did, I felt I could discredit the testimony enough for the jury. All an NCIC report would have told me was how many convictions this guy had. I asked him about convictions. He lied about it. No question about it, it would have gone to the credibility of his testimony.
>
> Q. Wouldn't it show that he had various convictions pending in several other jurisdictions?
>
> A. Sure.

> Q. But in your voir dire of him, you didn't ask him about those other convictions?
>
> A. I voir dired him basically about whether he had been offered anything for his testimony.
>
> I think we had another guy come in who was going to testify. I remember we had a witness who was going to try to testify this guy couldn't have heard these things. I don't remember the guy's name, but we did bring him into court, and he testified to those things, that Bishop could not have heard the things he said.
>
> They got this information that Mr. Lewis had laid his search warrant down. All the information contained in there, that would have been very easy for Mr. Bishop to have gotten this and read it. It was brought out to the jury.

(C.A.J.App. 146-147)

After the state court denied post-conviction relief and the Court of Criminal Appeals affirmed, the petitioner sought federal habeas corpus relief in the United States District Court for the Middle District of Tennessee. Regarding the *Brady* claim, the District Court denied relief but granted a certificate of appealability.

The United States Court of Appeals for the Sixth Circuit reviewed the *Brady* claim in light of that

Court's recent decision in *Bell v. Bell*, 512 F.3d 223 (6th Cir. 2008) (en banc) (Pet.App. 9a):

> [In *Bell*,] we held that the state's failure to turn over the sentencing records of a government witness was not a *Brady* violation because those records were publicly available and the petitioner could have obtained them. [*Bell v. Bell,* 512 F.3d] at 235. As was the case in *Bell*, Bishop's testimony derived from evidence he acquired while in prison with Petitioner, and Bishop further acknowledged on cross-examination that he was subject to extradition to Texas. Petitioner therefore "easily could have pursued any pending charges against [Bishop] and their disposition." *Id.* Thus, because the factual basis for Petitioner's claim was easily available from another source, the government was under no duty to supply that information to Petitioner. *See id.* (and citations therein).

(Pet.App. 5a)

The petitioner now seeks this Court's review.

REASONS FOR DENYING REVIEW

I. THE DECISION OF THE SIXTH CIRCUIT DOES NOT CONFLICT WITH PRIOR DECISIONS OF THIS COURT.

The petitioner argues that the decision of the Sixth Circuit, that the government does not violate the *Brady* rule when it fails to disclose favorable

information that is publicly available, conflicts with this Court's decision in *Brady* itself and with this Court's decisions in *Strickler v. Greene*, 527 U.S. 263, 266, 276, 289 (1999), and *Banks v. Dretke*, 540 U.S. 668, 695 (2004). However, the petitioner's argument is misplaced.

In *Brady v. Maryland*, 373 U.S. 83 (1963), Brady and a co-defendant were charged with first-degree murder. Brady admitted his involvement in the crime, but claimed that the co-defendant did the actual killing and pleaded with the court to spare his life. The state had in its possession a statement by the co-defendant in which the co-defendant admitted the actual homicide, but the state never divulged that information to Brady or his counsel. In *Brady*, this Court held that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id.* 373 U.S. at 87. *Brady* clearly established the duty of the state to provide exculpatory evidence to a criminal defendant, but did not establish a duty on the state to do for the defendant what the defendant could easily do for himself.

In *Strickler*, Strickler was charged with capital murder and related crimes. At trial, a witness gave detailed eyewitness testimony about the crimes and Strickler's role as one of the perpetrators. However, the prosecutor failed to disclose exculpatory materials in the police files, consisting of notes taken by a

detective during interviews with the witness and letters written by the witness to the detective, that cast serious doubt on significant portions of her testimony. While this Court reiterated that the prosecution has a duty to disclose favorable evidence to a defendant – both exculpatory evidence and impeachment evidence – even when such evidence has not been specifically requested, the evidence withheld from the defendant was within the exclusive control of the state. Unlike the information at issue here, there was no other source for the evidence in *Strickler*. Regardless of whatever efforts the defendant might have exerted, he was dependent on the state for the discovery of critical exculpatory evidence. Therefore, the decision in *Strickler* does not conflict with the decision in this case.

Likewise, in *Banks v. Dretke*, it was learned after Banks' conviction for first-degree premeditated murder that the state had withheld evidence that would have allowed Banks to discredit two essential prosecution witnesses. But again, the evidence was in the exclusive control of the state. The decision in *Banks* thus did not impose a duty on the state to provide evidence otherwise available to the defendant in a public record.

In both *Strickler* and *Banks*, the defendants had no reason to know about the evidence that had been withheld. Here, however, not only were the criminal history records available to the petitioner, but the status of the witness as a detainee at the jail indicated that charges were pending against the witness

and that prior convictions were likely to exist. Petitioner's counsel affirmed his knowledge that Ernest Bishop had a criminal history when he cross-examined Bishop regarding prior convictions and a pending extradition to Texas for a charge of sexual assault. Counsel admitted that he could have obtained an NCIC report of Bishop's criminal history, but chose not to do so.[2]

While *Strickler* and *Banks* stand for the proposition that the state has a duty to divulge exculpatory and impeachment evidence where such evidence resides in the sole custody and control of the government, neither case imposes a duty on the state to search public records for the benefit of a defendant – particularly when the defendant has demonstrated knowledge that such records exist and are available.

II. THE DECISION OF THE SIXTH CIRCUIT DOES NOT CONFLICT WITH DECISIONS IN OTHER CIRCUITS.

The petitioner suggests that there exists "an entrenched circuit split" of authority on the question presented in this case and that this is another reason for the Court to review the Sixth Circuit decision. But

---

[2] Petitioner's knowledge of and affirmative decision not to obtain the criminal history information of the witness in this case further distinguishes it from both *Strickler* and *Banks*, where this Court relied on the defendant's reasonable reliance on representations made by the state in not pursuing the evidence in question.

the petitioner severely overstates the variance of opinion among the circuits and fails properly to identify the issue upon which the circuits might actually disagree.

A. The Fourth Circuit

In the Fourth Circuit, the prevailing authority on this issue is *United States v. Wilson,* 901 F.2d 378 (4th Cir. 1990), where the Court clearly held that "where the exculpatory information is not only available to the defendant but also lies in a source where a reasonable defendant would have looked, a defendant is not entitled to the benefit of the *Brady* doctrine." *Id.* at 381.[3] Nevertheless, proclaiming that the Fourth

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[3] In *Wilson*, the defendant complained that the state failed to divulge affidavits of the live-in girlfriend of a CIA official who, according to the witness, intended to "set up" the defendant by framing him for an arms exportation conviction. The Court denied relief and explained:

> Although we recognize that any statements [the witness] may have made suggestive of a set-up could have helped Wilson's case, we find no *Brady* violation because Wilson was free to question [the witness] in preparation for trial. Indeed, given Wilson's awareness of [the witness's] closeness to [the CIA official] and given Wilson's belief that he was framed, it would have been natural for Wilson to have interviewed [the witness] in preparation for trial to determine if [the witness] could have supplied Wilson with exculpatory evidence. In situations such as this, where the exculpatory information is not only available to the defendant but also lies in a source where a reasonable

(Continued on following page)

Circuit has adopted a position contrary to both *Wilson* and the Sixth Circuit's holding in the current case, the petitioner refers to the unpublished decision in *Walker v. Kelly*, 195 Fed.Appx. 169 (4th Cir. 2006). In *Walker*, the state failed to provide the defendant copies of police reports indicating, contrary to her trial testimony, that an eyewitness did not actually see the defendant on the night of the murder. Specifically, two police reports indicated that a witness recognized the voice of an intruder who shot and killed two persons. But in both reports, the identification was limited to the shooter's voice. Further, in an affidavit by the reporting detective, he stated that the witness recognized the murderer's voice but was unable to visually identify him. None of these documents were provided to the defendant, but the state did provide an autopsy report which stated that unnamed "witnesses inside the home heard the shots but *did not witness the shooting*" and a pre-sentence report stating that the witness "*fled into the bathroom. . . . It was at that time, she heard three shots fired.*" *See id.* 195 Fed.Appx. at 173-174 (emphasis in original). The Fourth Circuit held that

> the availability of the autopsy and pre-sentence reports [did] not satisfy the prosecutor's duty to disclose the other *Brady* material to Walker. The withheld reports

---

defendant would have looked, a defendant is not entitled to the benefit of the *Brady* doctrine.

United States v. Wilson, 901 F.2d at 381.

> provide persuasive evidence that [the witness] did not see the shooter the night of the murder, whereas the files that were available earlier suggest only that [the witness] did not witness the shooting. As such, the withheld documents would have provided substantial evidence impeaching [the witness's] trial testimony that she saw the person who shot her father.

Id. 195 Fed.Appx. at 174.

In stark contrast to the evidence at issue here, the police reports and affidavit that should have been disclosed by police in *Walker* were documents within the sole custody and control of the state. The NCIC report of Ernest Bishop's criminal history, however, was in a public system of records and was accessible to the petitioner by other means. Therefore, even assuming that the unpublished decision in *Walker* expresses the state of the law in the Fourth Circuit,[4] it cannot be reasonably concluded that the Fourth

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[4] In another Fourth Circuit decision released less than a month before *Walker*, a different panel of the Court, on procedural grounds, declined to consider a claim that the state violated *Brady* by failing to divulge DMV records that might have been useful to the defense. The Court noted that even if it were to review the claim, "there is no merit to [a] *Brady* claim based on any failure of the attorney to turn over the DMV information which was available to the defendant in a place where a reasonable defendant would have looked." *Sanders v. Johnson*, 191 Fed.Appx. 240, 244 n.2 (4th Cir. 2006), *cert. denied*, 127 S.Ct. 2433 (2007) (citing *United States v. Wilson*, 901 F.2d 378, 381 (4th Cir. 1990)).

Circuit has adopted a position that is contrary to the Sixth Circuit decision in this case.

B. The Fifth Circuit

Petitioner contends that the Fifth Circuit has denied a public-availability exception to *Brady* by its decision in *Johnson v. Dretke*, 394 F.3d 332 (5th Cir. 2004). In *Johnson*, the defendant was convicted and sentenced to death for the 1995 murder of a gas station attendant in Texas. An accomplice to the crime entered into a plea agreement with the state and then testified against Johnson at trial, stating that Johnson shot and killed the victim. It was later discovered that the accomplice had entered into a factual stipulation related to his own plea where he averred that he, not Johnson, was the shooter. In his federal habeas petition, Johnson argued that the prosecution violated *Brady* and knowingly permitted false testimony to be presented to the jury. *Id.* 394 F.3d at 335. The Fifth Circuit, contrary to the petitioner's current argument, did ***not*** determine whether the state had a duty to disclose the stipulation to the defendant at trial. Addressing whether the habeas petitioner was entitled to a tolling of the habeas statute of limitations, the question was whether the petitioner had procedurally defaulted his claim by failing to raise it in a timely manner. Reviewing the district court's denial of the claim as time-barred and procedurally defaulted, the Fifth Circuit noted:

> [N]either the district court nor the State considered the possible effect of a potentially viable prosecutorial misconduct claim on the question of the petition's timeliness. If Johnson demonstrates, as he will be permitted an opportunity to do, that the State should have and failed to disclose [the accomplice's] stipulation, then he might demonstrate that his petition was filed within one year of "the date on which the factual predicate of the claim . . . presented could have been discovered through the exercise of due diligence." 28 U.S.C. § 2244(d)(1)(D). Similarly, the district court's determination that Johnson's claims are procedurally defaulted may be in error if it is determined that the failure to disclose [the accomplice's] stipulation constituted a claim not "reasonably available" at the time of the prior petition. . . . In finding procedural default, the district court relied upon the fact that [the accomplice's] stipulation was available in the public record. However, if the State failed under a duty to disclose the evidence, then its location in the public record, in another defendant's file, is immaterial.

Id. 394 F.3d at 336-337. The Fifth Circuit in *Johnson* did not determine that a *Brady* violation had occurred, but only granted a certificate of appealability on two issues: "(1) whether the petitioner's alleged prosecutorial misconduct claims met the due diligence requirement of 28 U.S.C. § 2244(b)(2)(B)(i); and (2) if so, whether Johnson's prosecutorial misconduct

claims merit relief." *Id.* 394 F.3d at 338. The *Brady* issue was left undetermined.

Subsequently, the Fifth Circuit held that Johnson had not demonstrated due diligence in discovering the stipulation upon which his claim was based, where it was shown that Johnson was aware of the accomplice's indictment and that Johnson's counsel was present at the accomplice's plea. The Court further noted: "The transcript of that plea reflects that [the accomplice's] factual stipulation was submitted. Thus, Johnson's counsel knew or should have known that [the accomplice] was also charged with shooting [the victim] and pleaded guilty to that charge as indicted." *Johnson v. Dretke*, 442 F.3d 901, 910 (5th Cir. 2006).

Petitioner's contention is further undermined by the decision of the Fifth Circuit in *United States v. Infante*, 404 F.3d 376 (5th Cir. 2005). There, the Fifth Circuit considered whether the prosecution had violated *Brady* by failing to provide the defendant with the psychiatric evaluation of a co-conspirator in the drug trafficking case against the defendant. The Court clearly held that "*Brady* rights are not denied where the information was fully available to the defendant and his reason for not obtaining and presenting such information was his lack of reasonable diligence." *Id.*, 404 F.3d at 386 (quoting *United States v. Dean*, 722 F.2d 92, 95 (5th Cir. 1983)). *See also United States v. Valles-Zamora*, 252 Fed.Appx. 701, 703 (5th Cir. 2007), *cert. denied*, 128 S.Ct. 1455 (2008) (citing *Infante* with approval).

C. The Ninth Circuit

Petitioner implies that the Ninth Circuit has also taken a position contrary to the position of the Sixth Circuit in this case, citing the decision in *Gantt v. Roe*, 389 F.3d 908 (9th Cir. 2004). *Gantt*, however, does not support this implication.

In *Gantt*, the defendant was charged with the robbery and murder of a man where no physical evidence except a matchbook connected the defendant to the victim. The matchbook, found in the defendant's possession after the murder, was from an Indian restaurant called "Shalimar" and had, written on the inside, a telephone number to a house in Bangladesh. The state theorized that the victim had written the telephone number in the matchbook and that the defendant took the matchbook at the same time he took the victim's wallet and murdered him. Although experts opined that the handwriting in the matchbook was consistent with the victim's handwriting, no connection between the victim and the house where the telephone number connected in Bangladesh was established. As part of their investigation, police faxed a photograph of the victim to Bangladeshi authorities, who showed the photograph to the proprietor of the house. Although the proprietor could not recognize the person depicted in the photograph, he told authorities that his son, who lived in Los Angeles, worked at the Shalimar restaurant and suggested he might know the victim. Although the state disclosed the meeting of Bangladeshi authorities with the proprietor of the house and also

disclosed that the man had a son in Los Angeles, police did not divulge the failure of the proprietor to recognize the photograph of the victim or the subsequent failure of the son to recognize the face in the photograph. *See id.* 389 F.3d at 909-911. In analyzing the case, the Ninth Circuit determined that the information that neither the proprietor of the house in Bangladesh nor his son in Los Angeles recognized the victim undercut the state's theory that the matchbook was taken from the victim by the defendant. Such information should have been disclosed to the defendant in accordance with *Brady*. Even though the defense might have obtained the same information by independent investigation, the Court held that the defendant "was surely entitled to rely on the prosecution's representation that it was sharing the fruits of the police investigation." *Id.* 389 F.3d at 911-913.

Gantt is dissimilar to the current case in that (1) the information acquired and not disclosed by the state in *Gantt* was not maintained in any public record; and (2) in *Gantt*, the state assured the defendant that it would share the fruits of its investigation. Here, the information in question was publicly available to petitioner, and the state never made any assurance to the petitioner that would have caused him not to look for it. In short, *Gantt* simply did not address the issue presented in the present case.

D. The Tenth Circuit

Finally, petitioner argues that "[t]he Tenth Circuit's precedents hew to this same rule"; he cites *United States v. Quintanilla*, 193 F.3d 1139 (10th Cir. 1999), for the proposition that "whether a defendant knew or should have known of the existence of exculpatory evidence is irrelevant to the prosecution's obligation to disclose the information" in the context of a *Brady* claim. *Id.* 193 F.3d at 1149.

In *Quintanilla*, the district court determined that the prosecution failed to disclose evidence acquired in a Drug Enforcement Agency (DEA) agent's interview of a co-conspirator in a drug case just three days before Quintanilla's trial. Various statements by the co-conspirator were deemed potentially exculpatory. However, the same information resulting from the interview had already been referenced in a motion for continuance filed by Quintanilla six days before trial. *Id.* 193 F.3d at 1147. Considering the prosecution's failure to turn over the DEA agent's notes of the interview to the defense under *Brady*, the Tenth Circuit reasoned:

> As we noted earlier, the evidence from [the DEA agent's] interview with [the co-conspirator] that was potentially exculpatory to defendant was known to defendant well before the interview. Defendant cited the same information six days before trial in support of her motion for a continuance. The district court is correct that whether a defendant knew or should have known of the

> existence of exculpatory evidence is irrelevant to the prosecution's obligation to disclose the information. *See Banks v. Reynolds*, 54 F.3d 1508, 1517 (10th Cir. 1995). "The only relevant inquiry is whether the information was 'exculpatory.'" *Id.* Nevertheless, a defendant's independent awareness of the exculpatory evidence is critical in determining whether a *Brady* violation has occurred. If a defendant already has a particular piece of evidence, the prosecution's disclosure of that evidence is considered cumulative, rendering the suppressed evidence immaterial. *Id.*

Id. 193 F.3d at 1149.[5] In the end, it is obvious that the Tenth Circuit does not hold the state in violation of Brady for not disclosing evidence of which the defendant is aware.

Petitioner also cites *Scott v. Mullin*, 303 F.3d 1222 (10th Cir. 2002), where the defendant, convicted of first degree murder and sentenced to death, argued that the prosecution concealed material evidence of another individual's confession to the murder of which he was convicted. *Id.* 303 F.3d at 1226. After Scott's trial, Scott's defense counsel learned of a letter in the possession of the state from another individual, Neal Rinker, suggesting that Rinker committed the murder. Additionally, it was discovered that another

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[5] *Banks v. Reynolds*, 54 F.3d 1508 (10th Cir. 1995), is also cited by petitioner in support of his argument.

person made a statement to investigators that he had heard Rinker confess to the murder. *See id.* 303 F.3d at 1226-1227. Thus, the evidence in question in *Scott* was in the sole custody and control of the prosecution, and the defendant could not access the evidence except through the state. While the Tenth Circuit stated in *Scott* that "[i]t is not a petitioner's responsibility to uncover suppressed evidence," *id.* 303 F.3d at 1229, it has also observed that evidence is not suppressed when it is "already known by and available to [the defendant] prior to trial." *United States v. Hernandez-Muniz*, 170 F.3d 1007, 1010 (10th Cir. 1999). The holding of the Sixth Circuit in *Bell v. Bell*, 512 F.3d 223 (6th Cir. 2008), followed by the Court in this case, that "the state's failure to turn over the sentencing records of a government witness was not a *Brady* violation because those records were publicly available and the petitioner could have obtained them" (Pet.App. 5a), is not at odds with the Tenth Circuit.

CONCLUSION

The petition for writ of certiorari should be denied.

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No. 08-119

IN THE
Supreme Court of the United States

ROGER DALE LEWIS,
Petitioner,

v.

STATE OF TENNESSEE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

1. The State of Tennessee acknowledges that, under the rule adopted by the Sixth Circuit and six other regional courts of appeals, prosecutors categorically owe no duty "to disclose favorable information that is publicly available." Brief in Opposition (Opp.) 8-9. This public-availability exception to *Brady* v. *Maryland*, 373 U.S. 83 (1963), is so expansive that a prosecutor in these circuits will not be deemed to violate *Brady* even if—as occurred in this case—he falsely assures defense counsel that "[t]here is no exculpatory or mitigating evidence known to the State at this time * * * [and] if additional discovery becomes available you will be advised promptly." CAJA 270. By reducing *Brady* to a duty to disclose only those documents that rest "within the *exclusive control* of the state," Opp. 10

(emphasis added), the seven circuits that hew to this rule of decision not only radically transform *Brady*'s scope but also invite chaos and confusion in the lower courts. The reason: Courts need to conduct precious line-drawing inquiries into who had access to a document, where was it stored, and how readily available was it.

Four other circuits—the Fourth, Fifth, Ninth, and Tenth—have rejected that rule in favor of a simpler approach and one more faithful to this Court's precedents: Prosecutors must disclose *all* evidence favorable to the accused that they posses, regardless of whether that evidence may also lurk elsewhere in the public domain. That bright-line rule promotes clarity and avoids the temptation for "gamesmanship that *Brady* and its progeny were designed to prevent." Pet. App. 44a (Clay, J. dissenting). It also properly accounts for the different roles and resources of prosecutors and defense counsel. After all, requiring prosecutors to disclose certain evidence that already resides in their files imposes virtually no burden at all—particularly if the prosecutors employ an open-file policy. In contrast, the public-availability rule endorsed by the Sixth Circuit foists on already-overburdened public defenders the duty to comb through public repositories simply to find the same evidence that already exists in the prosecutor's file. And the Sixth Circuit's rule becomes particularly pernicious when, as here, the prosecutor expressly assures defense counsel that all favorable evidence has already been produced. *See Banks* v. *Dretke*, 540 U.S. 668, 969 (2004) (any "rule thus declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process").

This Court should grant the petition to resolve at long last the question this petition squarely presents: whether the "prosecution's affirmative duty to disclose evidence favorable to a defendant" actually means *all* favorable evidence, *Kyles* v. *Whitley*, 514 U.S. 419, 433 (1995), or just the evidence that is "in the *exclusive* control of the state." Opp. 10 (emphasis added). That question has percolated in the regional courts of appeals for years, having now churned an entrenched 7-4 split. Indeed, the State notably does not dispute that six other circuits have endorsed the rule adopted by the Sixth Circuit below. Nor does the State seriously dispute that other circuits have squarely adopted a contrary approach, although it quibbles over meaningless factual distinctions between those cases and this one. Moreover, this case presents an ideal vehicle for resolving that split, given that the State concedes it did not disclose the sole piece of evidence at issue here; the Tennessee appellate court found that the State offered "no explanation" for failing to disclose that evidence, which it recognized was "imbued with impeachment value"; and the State not only failed to disclose information that was theoretically in the public domain but also led defense counsel to believe no such search would be necessary because all favorable evidence had already been disclosed.[1] The petition should be granted.

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[1] See CAJA 266 (affirmative request from defense counsel for impeachment evidence); CAJA 270 (affirmative representation from prosecutor that all impeachment material would be turned over); CAJA 177-184 (Bishop's NCIC report); *Lewis* v. *State*, 2003 WL 22438526, at *7 (Tenn. Crim. App. Oct. 28, 2003) (acknowledgment that State offered "no explanation" for breach of its representation to turn over material "imbued

2. The State dismisses the demonstrated conflict between the Sixth Circuit's ruling and *Strickler* v. *Greene*, 527 U.S. 263 (1999), and *Banks* v. *Dretke*, 540 U.S. 668 (2004), by asserting that those cases involved "the defendant's reasonable reliance on representations made by the state." Opp. 11 n.2. But this case, of course, involves the same reasonable reliance on representations by the State. Even the State concedes that Lewis's defense counsel requested all exculpatory or impeachment evidence from the prosecutor. Opp. 5. What the State neglects to mention in its opposition is that the prosecutor assured defense counsel that "there is no exculpatory or mitigating evidence known to the State at this time," but "if additional discovery becomes available you will be advised promptly."[2] CAJA 270.

There is thus no meaningful factual distinction between this case on the one hand and *Strickler* and *Banks* on the other. That is important because in those latter two cases, this Court emphasized that "[o]ur decisions lend no support to the notion that defendants must scavenge for hints of undisclosed *Brady* material when the prosecution represents that all such material has been disclosed." *Banks*, 540 U.S. at 695. But that is precisely the result that the Sixth Circuit's rule sanctions. This Court should

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with impeachment value"); Pet. App. 30a-31a (divided 6-5 en banc decision in *Bell* v. *Bell*); Pet. App. 5a (applying *Bell* to Lewis's *Brady* claim).

[2] The State's duty to disclose would have applied even if Lewis's counsel had not requested the materials. *See Strickler* v. *Greene*, 527 U.S. 263, 280 (1999) (citing *United States* v. *Agurs*, 427 U.S. 97, 107 (1976)).

grant the petition to resolve that fundamental tension.

The State's only other attempt to harmonize the Sixth Circuit's rule with this Court's precedents is equally specious. According to the State, *Brady*, *Strickler*, and *Banks* merely require prosecutors to provide criminal defendants with any exculpatory evidence that lies "within the exclusive control of the state." Opp. 10. Not so. That triumvirate of cases make clear that a *Brady* violation has three components: "[1] The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; [2] that evidence must have been suppressed by the State, either willfully or inadvertently; and [3] prejudice must have ensued," *i.e.*, the materiality requirement. *Strickler*, 527 U.S. at 281-282; *Banks*, 540 U.S. at 691. The Sixth Circuit's position—that a prosecutor is authorized to suppress evidence in its files anytime the defendant could theoretically scrounge together the same facts from somewhere in the public domain—directly conflicts with the Court's clear statement that the second prong focuses solely on the State's conduct in suppressing evidence known to it.[3]

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[3] Because a *Brady* violation is only remediable if a court finds that the suppressed material had a material effect on the trial's outcome, it is not the case that every suppression of evidence by the State will result in an actionable *Brady* claim. The court below never reached the third prong of the analysis, however, because it found the State's failure to turn over the criminal-history report of its star witness did not meet the second prong.

Strickler in fact specifically rejected the argument that the existence of a publicly available newspaper article should have precluded a *Brady* claim that the prosecution suppressed evidence. As the Court explained, nondisclosure by the prosecution is "conduct attributable to the Commonwealth that impeded trial counsel's access to the factual basis for making a *Brady* claim." *Strickler*, 527 U.S. at 283. Ultimately, *Brady*, *Strickler*, and *Banks* reinforce that the Sixth Circuit's ruling is incompatible with "the special role played by the American prosecutor in the search for truth in criminal trials." *Strickler*, 527 U.S. at 281.

3. The opposition also confirms the existence of a deep circuit split with serious ramifications for prosecutorial deception and gamesmanship. Indeed, the State concedes that a split exists, although it insists that the petition "overstates the variance of opinion." Opp. 12. But the petition got the nose-count exactly right. To begin with, the State does not dispute that the Sixth Circuit's decision accords with the law in the First, Second, Third,[4] Seventh, Eighth, and Eleventh Circuits. And its bid to minimize over the split between those courts and the Fourth, Fifth, Ninth, and Tenth circuits only confirms the confusion and conflict in the lower courts of appeals.

Fourth Circuit. In *Walker* v. *Kelly*, 195 Fed. Appx. 169 (4th Cir. 2006), the Fourth Circuit held that the

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[4] The Third Circuit has changed the rule it applies. *See* Pet. 19 & n.4; *see also United States* v. *Perdomo*, 929 F.2d 967, 971 (3d Cir. 1991) (reversing conviction because prosecution's failure to disclose prior record of key witness was a suppression of evidence in violation of *Brady*).

prosecutor has a duty to disclose *Brady* material, and that not doing so "violat[es] due process, as it condones the prosecutor's ability to conceal documents and requires a defendant to search for *Brady* material." *Id.* at 175 (citing *Strickler*, 527 U.S. at 280, and *Banks*, 540 U.S. at 696). The opposition asks the Court to ignore *Walker* in favor of an earlier Fourth Circuit decision pre-dating both *Strickler* and *Banks*. That makes no sense. *Walker* was decided on remand from this Court "for reconsideration of the *Brady* claim in light of the Court's intervening decision in *Banks* v. *Dretke*, 540 U.S. 668 (2004)." *Walker*, 195 Fed. Appx. at 171. In holding that the focus must be on "prosecutorial misconduct, not on the defendant's diligence," the Fourth Circuit's position stands in stark contrast to the Sixth Circuit's position. *Id.* at 175.

Fifth Circuit. Respondent asserts there is no circuit split involving the Fifth Circuit, yet acknowledges that the Fifth Circuit has held that "if the State failed under a duty to disclose the evidence, then its location in the public record, in another defendant's file, is immaterial." *Johnson* v. *Dretke*, 394 F.3d 332, 337 (5th Cir. 2004) (citing *Banks*, 540 U.S. 668, and *Strickler*, 527 U.S. at 280-281); Opp. 16.[5] The Fifth Circuit made this same point in *Mathis* v. *Dretke*, 124 Fed. Appx. 865, 877 (5th Cir. 2005), where it found "unpersuasive the State's argument that they had no duty to disclose

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[5] Contrary to Respondent's suggestion (Opp. 17) the subsequent decision by the Fifth Circuit involved the due diligence standard for successive petitions under the Antiterrorism and Effective Death Penalty Act, not the standard for a *Brady* violation. *See Johnson* v. *Dretke*, 442 F.3d 901 (5th Cir. 2006).

exculpatory evidence that was available in the public record." That the Fifth Circuit reached a different conclusion on the "particular facts" of *United States* v. *Infante*, 404 F.3d 376, 387 (5th Cir. 2005), where the evidence at issue was in the file of an alleged co-conspirator facing "closely related" charges, only underscores the need for uniformity and clarification from this Court.

Ninth Circuit. Respondent next asserts that the Ninth Circuit is not part of a circuit split. That is incorrect. Earlier this year, the Ninth Circuit held that the prosecution violated its *Brady* obligations by failing to turn over criminal-history information regarding its witnesses, requiring a mistrial when that failure was discovered. *See United States* v. *Chapman*, 524 F.3d 1073, 1078 (9th Cir. 2008). Criminal-history information was thus at issue in both *Chapman* and in this case—yet the Sixth and Ninth Circuit reached directly opposite results. In addition, in *Gantt* v. *Roe*, 389 F.3d 908 (9th Cir. 2004), the Ninth Circuit explained that because our system of due process does not permit any rule "declaring 'prosecutor may hide, defendant must seek,' " it is irrelevant whether defense counsel could have independently discovered exculpatory materials that the prosecution suppressed. *Id.* at 913 (quoting *Banks* v. *Dretke*, 540 U.S. 668 (2004)). And it reiterated that defense counsel is entitled to rely on the prosecution's representation that it has complied with Brady. *Id.* The Sixth Circuit, in contrast, held that hide and seek is permissible anytime the hidden information could theoretically be uncovered in the public domain—even if the prosecution assures defense counsel that it has fully disclosed all evidence favorable to the defense.

Tenth Circuit. Finally, Respondent's attempt to reconcile the Tenth Circuit's position with the Sixth Circuit's is also unavailing. Respondent admits that *Banks* v. *Reynolds*, 54 F.3d 1508 (10th Cir. 1995), conflicts with the decision in this case. Opp. 21 n.5. Respondent then extensively quotes from *United States* v. *Quintanilla*, 193 F.3d 1139 (10th Cir. 1999), reinforcing that this case too is in conflict with the Sixth Circuit's decision. The *Quintanilla* court held that whether a defendant knew or should have known of exculpatory evidence "is irrelevant to the prosecution's duty to disclose"—thus creating a direct conflict with the Sixth Circuit. *Id.* at 1149. To be sure, the court went on to note that if a defendant has *actual* knowledge of the evidence, the defendant may be unable to establish prejudice, the third prong of the *Brady* analysis. *Id.* That, of course, makes sense. But there is a colossal difference between a defendant who has actual knowledge of exculpatory information and a defendant who is merely charged with *constructive* knowledge of that information based solely on its theoretical existence somewhere in the public domain.

3. Finally, Respondent does not attempt to dispute that the Sixth Circuit's ruling is inconsistent with the realities of the criminal justice system. Pet. 22-23 & n.5 Forcing resource-strained defense counsel to independently comb the vast public domain for materials with exculpatory or impeachment value that are already known to prosecutors is profoundly unfair to defendants and re-injects the systemic gamesmanship and prosecutorial deception that *Brady* and its progeny sought to eliminate. It is simply not viable in our system of justice to opt for a rule that requires, for

example, the 22 public defenders in the Knox County Tennessee Public Defender office to scour the earth for impeachment material sitting undisclosed in the prosecution's files in each of the 23,000 cases that these 22 attorneys handle every year. *See* Georgia N. Vagenas, American Bar Ass'n, *Indigent Defense: National Developments in 2007*, 22 WTR Crim. Just. 58 (2008); *see also* The Spangenberg Group, Resources of the Prosecution and Indigent Defense Functions in Tennessee (May 2007) (concluding that in Tennessee, where Mr. Lewis's case arose, "indigent prosecution funding is between two and two-and-a-half times greater than indigent defense funding"), *available at* http://www.abanet.org/legalservices/sclaid/defender/downloads/TN_CompStudyFINAL_7.30.07.pdf.

The practical realities of the criminal defense system further mandate correction of the erroneous decision below. Prosecutors may not withhold impeachment evidence, mislead the defendant as to the existence of that evidence, and then blame defense counsel for not independently exploring the public domain to confirm that the prosecutor was actually telling the truth. The rule below is antithetical to our system of justice and defendants' due-process rights.

* * *

For the foregoing reasons, and those in the petition, the petition should be granted.

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